CASES AT LAW

ARGUED AND DETERMINED IN

THE SUPREME COURT

OF

NORTH CAROLINA.

AT RALEIGH,

JUNE TERM, 1850.

SAMUEL H. CHRISTIAN vs. BARNABAS NIXON & AL.

In general, a vendor of land is bound to prepare the conveyance and tender it or offer to do so, but where, from the nature of the contract it appears, that those, to whom the title was to be made, were unknown to the vendor, but known to him who made the purchase, the latter is bound to give the necessary information to the vendor, or, if he fails, to pay the price contracted for.

Appeal from the Superior Court of Law of Randolph County at a Special Term in July 1849, His Honor, Judge BATTLE, presiding.

No counsel for the plaintiff.

G. C. Mendenhall, for the defendant, submitted the following authorities:

To establish the doctrine of concurrent acts and dependent conditions in contracts, see Smith's leading cases,

page 9, 13 division. 8 T. R. page 366, case of *Glazebrook* v. *Woodrow*, see whole opinion of Grose, J. 1 Saunders Rep. 320, William's notes division 5, top page 320, and case of *Pordage* v. *Cole*. 1 Blackford's Reports 175, the case of *Leonard* v. *Bates*, and *note*. 10 Johns. Rep. 266, the case of *Jones* v. *Gardner*. 2 John. Rep. 207, case of *Green* v. *Reynolds*, see whole opinion of the Court. 15 Massachusetts Rep. 500, *Gardiner* v. *Corson*, see Jackson, J., on 474 top page. 2 Iredell 297, *Gardiner* v. *King*. 4 Dev. 283, *Cowper* v. *Saunders*. 1 Ventris, *Large* v. *Cheshire*. Salk. 112, *Col.* v. *Briggs*. Stephen. Nisi Prius. 1079. 58 E. C. L. Repts. 164, *Sanders* v. *Opie*, 2 Saund 350. 4 T. R. 763. 1 East. 203, *Ransom* v. *Johnson*, see Kenyon's opinion 206 top. 4 Iredell 497, *Clayton* v. *Blake*. 2 Pickering 292. 1 Strange 569, *Lock* v. *Wright*.

Pearson, J. Phineas Nixon, Sen., owned a tract of land, to which the plaintiff alleged he had acquired title, under a sale for taxes. After the death of the said Phineas, his executors Phineas Jr. and Barnabas Nixon, in behalf of their testator's estate, proposed to buy the claim of the plaintiff: and fifty dollars was finally agreed on as the price. The contract was closed by a letter from Phineas Nixon to the plaintiff, in which he says, "Thou may'st consider this as our promise to pay thee fifty dollars for thy quit-claim belonging to the estate of our father."—Signed "Phineas Nixon, Ex'r. of Phineas Nixon, dec'd."

Phineas Nixon, Jr. afterwards died, and the defendants administered upon his estate. The plaintiff called on the defendant Barnabas for the $50, and told him he was ready to execute the quit-claim deed, if he knew to whom to make it, and asked who were the persons entitled as heirs of Phineas Nixon, Sen., and to whom he should make the deed. The defendant refused to pay the money and declined giving the information requested. The

plaintiff then issued a warrant for the fifty dollars. His Honor was of the opinion that the plaintiff had not made out a case. In this there was error.

The payment of the money and the execution of the deed were concurrent acts; and the plaintiff was not entitled to the money, until he had performed, or offered to perform, his part of the agreement.

As a general rule, it is the duty of the vendor to prepare the deed, and deliver, or offer to deliver it, to the vendee, this being embraced in what he has agreed to do in consideration of the price. The case is different in England, in consequence of the peculiar circumstances existing in that country, which make conveyances extremely complicated. Those circumstances do not exist here, and we are governed by the rule, that each party must do or offer to do all he has undertaken, before he can require performance of the other. The preparation of the deed is considered a part of the vendor's undertaking, unless the terms of the contract furnish an inference to the contrary. When the land to be conveyed and the person to whom the deed is to be made are certain, so that the vendor knows how to make it, it is his duty to do it; but when the contract is general and the person to whom the vendor may wish the deed made, is not ascertained, then it is the duty of the vendee to prepare the deed, or at all events to give the vendor such information as will enable him to do it. This is necessarily implied from the fact, that the contract is left open in this particular; for otherwise the vendor would be required to do an impossibility, and the refusal of the vendee to give this information, which lies within his knowledge, evinces a desire on his part to have a pretext for avoiding his contract.

In this case, the contract was made in behalf of those, who were entitled to the land, as devisees or heirs of Phineas Nixon, Sen. The plaintiff is not presumed to

know them, but the fact is within the knowledge of the defendants. It was their duty to give the information; by withholding it, they put it out of the power of the plaintiff to make the deed. They cannot take advantage of their own wrong, and thus escape from the performance of a contract of their intestate.

PER CURIAM. There must be a *venire de novo*.

JOHN PATTERSON *vs.* WILLIAM BODENHAMMER & AL.

The action of trespass *quare clausum fregit* is a remedy for an injury to the possession, and therefore cannot be maintained by one who had not the possession, at the time the injury was alleged to have been committed.—The cases of *Dobbs* v. *Gullidge*, 4 Dev. and Bat. 68, and *Tredwell* v. *Reddick*, 1 Irod. 56, cited and approved.

Appeal from the Superior Court of Law of Guilford County at the Spring Term 1850, His Honor, Judge BATTLE, presiding.

The following is the case sent up from the Court below:

This was an action of trespass *quare clausum fregit*, to which the defendants pleaded not guilty.

The plaintiff relied upon both an actual and constructive possession of the *locus in quo*, at the time when the trespass was alleged to have been committed. To show a constructive possession, founded on title, he produced a grant to John Talbot, dated in 1847, and a deed from Talbot to George Mendenhall, dated in 1793. He then produced the deed from one Robert Stewart to Eli Pugh,

dated Nov. 14th, 1830, a deed from the said Pugh to John Horney, dated Nov. 11th, 1834, a deed from said Horney to Jeffrey Horney, dated Sept. 1835, and a deed from said Horney to John Lamb, dated Sept. 1840, and then a deed from the said Lamb to the plaintiff, dated 25th April, 1843, all of which included the *locus in quo*. It was testified that the land, included in the deed to Stewart, was open forest, no part of which was in cultivation, but he and the successive proprietors after him occasionally cut rails upon it for the use of other plantations. It was stated that Jeffrey Horney cut rails upon it every year, while he owned it, and hauled them off to a plantation, which he cultivated about three miles distant. It was stated, further, that Lamb built a house upon the land in April or May 1839. The deed from Lamb to the plaintiff conveyed a small half acre lot, situated in the town or hamlet of Florence, upon which was an unfinished house, built by William Patterson, a son of the plaintiff. It was then shown that the defendants moved this house from the lot in March 1846: and it was for this that the action was brought, the writ having been issued the 17th June 1846.

To show an actual possession the plaintiff introduced a witness, who testified, that, immediately after the plaintiff's purchase, he went and nailed boards across the space intended for a chimney and the windows, which were open, and put some empty boxes and barrels in the house.

The defendants contended, that the plaintiff had shown no such title as gave him a constructive possession of the house and lot in question: and that, at the time when the house was removed, it was in the actual possession of them or one of them, and that therefore the action could not be sustained. To prove this possession, they called as a witness one Thomas Barnum, who testified that the defendant Bodenhammer came to his residence

in Westminster and requested him to go and see him take possession of the house in question; that he went and saw the said defendant tear off the boards, which the plaintiff had nailed across the windows and put out the plaintiff's boxes and barrels, and agreed with the defendant Dillon, by parol, that he might have the house for twelve months at six pence per month, each party being at liberty to put an end to the lease by giving the other notice. This was in May 1844. Another witness testified, that the defendants Dillon and White had some timber and a wagon in the house, and that a man, named Beard, also kept a wagon in it, being kept open; and that it was used for no other purpose than as a repository for such things.

The defendants offered in evidence a paper for the purpose of showing that William Patterson had an interest in the house and lot, which was liable to be sold for the payment of his debts, and also for the purpose of showing that upon William Patterson's failing to comply with his contract, the defendant Dillon, who had bought from Lamb the residue of the tract of land, was entitled to take possession of the *locus in quo*, but it being admitted that William Patterson had failed to comply with the terms of his contract, and that the defendant Dillon had no deed covering the house and lot in question, the Court rejected it, holding that it was immaterial, as they had already been permitted to show themselves, as far as they could, to have been in the actual possession of the house at the time of its removal.

The Court was of opinion and so charged the jury, that the plaintiff had not shown a complete title, so as to give him a constructive possession, but that, if the evidence were believed, he had shown an actual possession, against which the defendants had proved nothing to prevent his recovering in this action. The plaintiff had a verdict, whereupon the defendants moved for a new trial for the

rejection of testimony and for misdirection in the charge, which motion was overruled, and a judgment given, from which the defendants appealed.

Kerr, for the plaintiff.

G. C. Mendenhall, for the defendants submittted the following argument:

7 Comyns Digest 492 and '3, to show *actual possession* is necessary to sustain trespass. 9 Johnsons Rep. 61, *Stuyvesant* v. *Tompkins*, see caption and first part of Court's opinion as to *lawful* as well as *actual* possession necessary. 1 T. Rep. 426, *Stotts* v. *Booth*, Buller, J. top page 227. N. C. Term Rep. 108, *Sheppard* v. *Sheppard*, this to show a possession short of 7 years, will not allow a plaintiff to recover in ejectment; see caption and Daniel's opinion. 2 Car. L. Rep. 89, *McMillan* v. *Hoffley*, see whole of Cameron's opinion as to actual possession necessary to sustain the action of trespass to land. 4 Dev. Rep. 232, *Graham* v. *Houston*, see caption and last page of Ruffin's opinion, top 234, to show cutting trees is no disseisin. 4 Dev. & Bat. 164, *Ring* v. *King*, to shew plaintiff cannot sustain trespass without actual possession, and this must mean *lawful* possession—last half of Gaston's opinion 168 top. 4 Dev. 158, *Green* v. *Herman*, see page 161, nearly all this page to show cutting trees not good or cultivation necessary, see also bottom of page 162 to show every man should know his own boundary. 12 Johnson's Reports 193, *Wick* v. *Freeman*, to shew an actual re-entry is necessary or actual title in the plaintiff; read the whole case. 6 Bac. Abr. 566, (3 clauses left and 2 right.)

Nash, J. The judgment in this case must be reversed. The plaintiff has shown neither an actual or constructive possession of the premises in question. To avail himself of the latter, he must prove the legal title in himself at

the time the alleged trespass was committed. In this he has not succeeded, and the jury were so instructed by his Honor, who tried the cause. It is however, in the second branch of the charge, that the error lies, of which the defendants complains. After informing the jury that the legal title was not in the plaintiff, the charge proceeds, "that if the evidence is believed, the plaintiff had shewn an actual possession, against which the defendants had proved nothing to prevent his recovery in this action." We do not concur with his Honor. At the time that Lamb, who claimed title to the premises, conveyed to the plaintiff in 1843, there was on them an unfinished house. The plaintiff put into it some empty barrels and boxes and nailed plank over the spaces left in the walls, for a window and fire place. This was the only possession he ever had, as far as the case discloses. A year after, in May 1844, the defendant Bodenhammer pulled off these boards and threw out the articles put there by the plaintiff, and leased the house for twelve months to one of the other defendants, who put into it some wagon timber.—In this condition the premises remained, until March 1846, when the house was removed by the defendants; and the case states, that this removal constituted the trespass, for which the action was brought. It is very clear it cannot be sustained. Whatever possession the plaintiff may have acquired by putting into an unfinished house, which had never been inhabited by him or any other person, some empty barrels and boxes, and nailing on the boards, as set forth in the case, was lost to him by the acts of Bodenhammer of a similar character. If they were sufficient to give Patterson the actual possession, similar acts on the part of the defendant were sufficient to divest him of it, and place the actual possession in the latter. The acts were of the same character and must carry with them the same effects. Two years after Bodenhammer had dispossessed the plaintiff, and while his

possession, so acquired, continued, the house was removed. To enable the plaintiff to maintain an action for the removing of the house, he ought to have re-entered before the house was removed and thereby revert the possession in himself. The action of *quare clausum fregit*, is a remedy for an injury to the possession; *Dobbs* v. *Gullidge*, 4 Dev. and Bat. 68, and therefore cannot be maintained by one who has it not. *Tredwell* v. *Reddick*, 1 Ired. 56.

His Honor erred in directing the jury, that at the time the house was removed, Patterson, the plaintiff, was in the actual possession of it, and could maintain his action.

PER CURIAM. Judgment reversed and a *venire de novo* ordered.

B. T. DAVIS & AL. *vs.* SAMUEL HILL & AL.

When a petition is filed to discontinue an old road between certain points and establish a new one between the same points, and the petition is opposed, and the Court, upon the hearing, refuse to discontinue the old road and establish the new road as prayed for, but direct another road to be opened, passing over only a part of the route prayed for by the petitioners; *Held*, that the defendants were entitled to recover their costs.

Appeal from the Superior Court of Law of Randolph County, at the Spring Term 1850, His Honor, Judge BATTLE, presiding.

No counsel for the plaintiffs.

Mendenhall, for the defendants.

PEARSON, J. The plaintiffs in their petition allege, that the public convenience would be promoted by making a new road from Cunningham's old place, to a fork near William Bingham's plantation, running by Davis' tanyard, John Hammond's and on by Ferguson's smith-shop; and by discontinuing the old road between those two points. The prayer is that a new road be established between the two points, passing by the places designated, and that the old road be discontinued. The defendants object to the change in the road. They oppose the new road and insist that the old road should not be discontinued.

The County Court ordered the new road to be laid off and the old road to be discontinued. The defendants appealed and the Superior Court refused to establish the new road or to discontinue the old road, but it was ordered that a new road be laid off from Ferguson's smith-shop, to the fork near William Bingham's plantation, and it was further ordered that the defendants pay the costs, from which latter order they appealed.

The defendants were certainly left "in possession of the field of battle," and we are at a loss to see upon what ground they were required to pay the costs. Whether under this proceeding, the Court had the right to establish the road, which is ordered to be laid off, is not submitted to us; as the appeal is only from the judgment as to the costs. But it might well have been questioned. There was no petition in writing, setting forth that such a road would promote the convenience of the public, and no notice was given that application would be made for it; so that although there was proof of its utility, it was "*probata*" *sed non* "*allegata.*" An application for a road, from one point to another, does not include a road from one of the points to any intermediate point: for grant that the road, if laid out the whole distance, would be useful, *non constat*, that, if it stopped half way, it would be of any manner of use: in general it would not. A fence en-

closing the whole field would protect the crop, but if it stops half way, it is of no use. In this case it only appears incidentally, that there is a road to Fayetteville, which passes by Ferguson's smith-shop, into which the new road will lead.

Waiving this question, the controversy was, shall the old road be discontinued between certain points and a new road made in its stead. This was decided in favor of the defendants and they were entitled to recover their costs. There is a plain distinction between an application for a road and an ordinary action at law, in which the plaintiff seeks to recover the whole and *every part* of his demand, for a road is an *entire thing*. If the petitioners, in the event that the whole is not established, desire that it be established to an intermediate point, this should be set forth in the petition, and then it would appear, whether the defendants opposed *the part* as well as the whole. In this case, it does not appear that the *defendants made any objection to the road which his Honor ordered to be laid out*, and it can make no difference, that this road happened to pass over a part of the ground, over which the road applied for was to run. It is true, "the whole includes all of its parts," but that supposes that the whole has an existence; here "the whole" was refused, and it is an obvious fallacy, to say, in reference to this question, that the road, established by the Superior Court, is a part of the road which the petitioners applied for.

Per Curiam. The judgment below must be reversed and the defendants must have judgment for their costs.

LAW LIBRARY OF THE UNIVERSITY OF MICHIGAN.

GROVES M. BRAZIER *ex* JAMES ANSLEY.

To sustain the action of trover, the right of property in the thing claimed and of possession, at the time of the alleged conversion, must be vested in the plaintiff.

A cropper has no such interest in the crop, as can be subjected to the payment of his debts, while it remains in mass, until a division, the whole is the property of the landlord.

The doctrine of appropriation, as constituting a delivery and thereby passing the title to the purchaser, arises in cases of a sale of goods generally, as distinguished from the sale of a specific chattel. And when a less quantity, out of a larger, is the subject of the contract, then no property passes to the purchaser until a delivery; for until then the goods sold are not ascertained.

The vendor may appropriate the quantity purchased by separating it from the bulk: but the appropriation is not complete until the vendee assents to take the separated portion.

The cases of the *State* v. *Jones*, 2 Dev. and Bat. 544—*Hare* v. *Pearson*, 4 Ired. 77, and *Lewis* v. *Moody*, 4 Dev. and Bat. 323, cited and approved.

Appeal from the Superior Court of Law of Chatham County, at the Spring Term 1850, His Honor, Judge Battle, presiding.

The following is the case sent up from the Court below:

This was an action of trover for a parcel of corn.—Plea, not guilty.

On the trial the plaintiff introduced a witness named Brown, who testified, that, during the year 1845, he worked with the defendant on a farm of the latter and was to have a fourth part of the corn made upon it for his services; that, before the corn was gathered, he sold his interest in it to the plaintiff for $40; that wishing to leave the farm, the plaintiff sent some hands to assist in gath-

ering the crop, but the defendant objected to the arrangement, whereupon it was agreed between the plaintiff and defendant, that the latter should gather the crop, for doing which he was to have five barrels of corn, and that he would notify the plaintiff at each division. Upon cross examination the witness stated, that he became indebted to the defendant for some articles furnished him during the year, and that he agreed to pay the defendant when he sold his corn. Another witness, Mr. Marks, was then called and stated, that, some time in the Fall of 1845, he was called upon to see the corn measured, that both the plaintiff and the defendant were present, when the latter measured the corn by putting three fourths of it in one heap and the remaining fourth in another, and that he then claimed to take five barrels and a sufficiency to pay Brown's account from the smaller heap, to which the plaintiff objected, saying, that the five barrels ought to be taken from the whole quantity before division, and that there was no claim upon it for Brown's account.— The parties disputed for some time about this matter, when the plaintiff went off, saying, he would have nothing more to do with it. The witness stated further, that, if all the defendant claimed had been allowed, there would have remained only a few bushels of corn for the plaintiff, and that there was no final delivery of any part of it to the plaintiff.

The plaintiff having closed his case, the defendant moved that he should be non-suited upon the ground that the action of trover could not be maintained, because no part of the corn had ever vested in the plaintiff, and that there was no demand before suit brought.

The motion was resisted upon the ground, that the defendant was estopped to deny that the plaintiff had acquired Brown's share of the corn, for the reason that he had ratified the contract made by the plaintiff and Brown.

The Court being of opinion that the action could not be maintained, the plaintiff submitted to a judgment of non suit and appealed.

Haughton, for the plaintiff.
W. H. Haywood, for the defendant.

Nash J. To sustain the action of trover, the right of property in the thing claimed, and of possesion at the time of the alleged conversion, must be united in the plaintiff, and he must prove that, while the property was his, the defendant converted it. *Gordon* v. *Harper*, 7th Term 9. *Harwood* v. *Smith*, 2nd Term 750. *Lewis* v. *Moody*, 4 Dev. and Bat. 323. In this case it is denied by the defendant, that the plaintiff had any title to the corn sued for or that he has converted it. As to the title, the plaintiff urges that the facts proved show that an appropriation was made by the defendant, the landlord, of one fourth of the crop to Brown, the cropper, which was a delivery in law, or at any rate the evidence ought to have been left to the jury, under the instruction of the Court. A full and complete answer is furnished by the case to each position of the plaintiff. It is a well settled principle of law, in this State, that a cropper has no such interest in the crop, as can be subjected to the payment of his debts, while it remains *en masse*. Until a division the whole is the property of the landlord. *State* v. *Jones*, 2 Dev. and Bat. 544. *Hare* v. *Pearson* 4 Ired. 77. The defendant was the owner of the land, on which the corn was raised, and a man by the name of Brown cropped with him. The latter transferred his interest to the plaintiff for a valuable consideration. After the corn was matured, it was agreed between the plaintiff and the defendant, that the latter should gather the corn, and for so doing, should have five barrels. The corn was gathered by the defendant, and placed by him in two separate heaps or piles; one containing three fourths and the other one fourth. From

this pile the defendant claimed to take his five barrels for gathering. To this the plaintiff objected, alleging they ought to come out of the whole crop. With this dispute we have nothing to do, as it regards the proper construction of the previous agreement. It is sufficient for our present enquiry, that a controversy did arise, and that the plaintiff would not agree to the construction put upon it by the defendant. The case states that the plaintiff "went off, saying he would have nothing more to do with it." Brown, the cropper, was present, but in no way interfered, and what afterwards became of the corn we are not informed, except that it is stated in the case, that no part of the corn was finally delivered to the plaintiff. There certainly was here no appropriation by the landlord of any specific portion of the crop to the use of Brown or the plaintiff, and therefore there was no delivery to the latter. The doctrine of appropriation, as constituting a delivery and thereby passing the title to the purchaser, arises in cases of a sale of goods generally, as distinguished from the sale of a specific chattel. And where a less quantity, out of a larger, is the subject of the contract, there no property passes to the purchaser until a delivery, for until then the goods sold are not ascertained. To constitute a delivery in such cases, the vendor may appropriate the quantity purchased, by separating it from the bulk. But the appropriation is not complete, until the vendee assents to take the separated portion; his assent is equivalent to accepting possession under the contract. 1st Chap. on Cont. 375. In a case like this, which in principle is similar to that of a sale of a lesser part out of a larger, the appropriation by the landlord was incomplete, until ratified by the cropper or his agent and vendee, the plaintiff. It would be manifestly unjust to suffer the landlord to be the sole judge of the rights of his cropper. Not only was the assent of the plaintiff withheld, but he positively refused to receive the corn set apart for him or

his principal. The title to the corn never vested in him, and he cannot, under this evidence, support the action of trover. The cases cited in the argument for the plaintiff abundantly prove that a delivery may be proved, by an appropriation by the vendor, but in none of them is it said, that it is complete without the assent of the vendee. We agree with his Honor that the action cannot be sustained.

Per Curiam. Judgment affirmed.

THOMAS BILES vs. MOSES L. HOLMES & AL.

Ordinary care, reasonable time and probable cause, the facts being established or proved, are questions of law, to be decided by the Court.

The declarations of a slave, as to his health and the condition of his body, are admissible in evidence in an action brought by his master to recover damages for an injury done to him.

The cases of *Herring* v. *Wil. & Ral. R. R. Company*, 10 Ire. 402, and *Swaim* v. *Stafford*, 3 Ire. 293, cited and approved.

This is an action on the case, in which the plaintiff claims damages for an injury to his slave named Green, which has greatly impaired the usefulness, and lessened the value of the said slave. The plaintiff declares in many counts; in one set, he alleges that the injury arose from the negligence of the defendant; in another set, he alleges, that the injury arose from the negligence of the agent of the defendant; in a third set, he alleges, that the injury arose from the want of ordinary care on the part of the defendant; and in a fourth set, he alleges, that the

injury arose form the want of ordinary care of the agent of the defendants; and alleging in each count, that the defendants were the bailees of the plaintiff, the defendants having hired from the plaintiff the said slave, to-wit, at the gold mines of the defendants and were bound to take that care of Green, which an ordinary man would take of his own property. The suit was instituted by Thomas Biles, as plaintiff against Moses L. Holmes, John McCoffin, and others, as defendants. The plaintiff introduced John Cauble as a witness, who proved that the defendants had hired from the plaintiff his slave Green, to work at the mine of the defendants at Gold Hill; that he, Green, had been put to work at the bottom of a shaft about one hundred and eighty feet deep, from which the defendants were taking gold ore; that buckets about three feet deep, each capable of holding sixty gallons, were alternately let down and drawn up; as the one was ascending, the other was descending, being used to bring up either ore or water to the surface of the earth; that the witness was in the service of the defendants and was employed as their "lander' at the mouth of the shaft, it being his duty to receive and unload the ascending buckets and to fix and let down the descending buckets; and to put in the descending buckets whatever was to be sent down the shaft; that these buckets were used to bring up water and ore; that in the bottom of the buckets was an aperture four inches square, over which was a valve six or eight inches square, and fastened at one end to the bottom of the bucket, which valve being raised at the other end when the bucket was brought up and landed, the water escaped; that when these buckets were used to bring up ore, or to carry down implements to work with, the aperture was closed with a wooden plug nailed in from the outside, and as a further security against anything falling through the bottom of the bucket, the valve was nailed down over the aperture on the inside; that without the

valve on the inside, or iron hoops on the bottom, securing the plug in the aperture, the buckets are not safe, and are not in a condition to be used with safety to those who are working at the lower extremity of the shaft; that, about nine o'clock in the morning, on the 28th January 1848, as one of the buckets commenced descending, the witness, who was the "*lander*" of the defendants, dropped into it four iron drills, each weighing five pounds, which instantly passed through the aperture in the bucket at its bottom and one of them struck Green on the head, and fractured his skull, which made the operation of trepanning necessary, and a large piece of the skull bone was cut out. Green was working at that time at the bottom of the shaft, directly below the bucket. The witness knew that Green and a white man were then working there together: that drills are implements used by miners in getting the ore; that, at the time the drills were put in the bucket, there was no valve in the bucket, and there was no iron hoop or strap at the bottom of the bucket to secure the plug; that the witness had been engaged from twelve o'clock at midnight until nine o'clock the next morning, when Green was injured, the witness being employed during that period as the lander of the defendants, in landing and unloading the buckets, at the mouth of the shaft; and during the said period the witness had not looked into either of the said buckets, or put his hand in either of them, to ascertain if the aperture at the bottom was properly secured.

Another witness was introduced by the plaintiff and was asked, if Green did not complain much of head-ache, when exposed to the sun, and if Green did not state his inability to work in the sun, or to work in any laborious employment. These declarations of the said slave were opposed as evidence in the cause by the counsel for the defendants, and they were excluded by the Court.

His Honor charged the jury, that this was a bailment beneficial to both parties, and that, if the defendants had hired the slave Green from the plaintiff, they, the defendants, were bound to take that care of Green, which a prudent man would take of his own property: and if the injury complained of in this case arose from an omission, on the part of the defendants, or their agent, of that care which a prudent man would take of his own property, which was a question for the jury, then the defendants were liable in this action. But if they believed, that the defendants, or their agent, had not omitted on this occasion that care of Green, which a prudent man would take of his own property, then they should find for the defendants. The jury rendered a verdict in favor of the defendants. Rule for new trial. New trial refused and rule discharged. Judgment for the defendants, from which judgment the plaintiff prayed an appeal to the Supreme Court, which was granted.

No counsel for the plaintiff.

Mendenhall, for the defendants.

Pearson, J. What amounts to "ordinary care" is a question for the Court. The Judge below erred in leaving it to the jury.

Whether the proof establishes particular facts is for the jury; but what is the legal effect of these facts, supposing them to exist, is for the Court. Accordingly it is settled, that ordinary care, reasonable time, and probable cause, the facts being admitted or proved, are questions of law. *Herring* v. *Wil. & Ral. R. R. Company*, 10 Ire. 402, *Swaim* v. *Stafford*, 3 Ire. 293.

If these were not questions of law, no rule could ever be established, and the legal effect of certain facts, like their existence, would in all cases depend upon the finding of a jury, with no mode of having its correctness judged of by a higher tribunal.

Had the jury come to a correct conclusion, the error of the judge in submitting the question to them, instead of deciding it himself, would have been immaterial; but, taking the evidence to be true, there was manifestly a want of ordinary care. A large bucket, with a hole four inches square in the bottom, the fastenings of which were liable to be knocked off, is used nine hours without any examination and as the bucket commenced descending, four pieces of iron, weighing five pounds each, are *dropped* into it, without looking to see, as might have been detected by a mere glance, that the fastenings were off and the hole open, and this too when the lives of two men were at stake. "Ordinary care" required, that the fastenings should have been examined and the pieces of iron should have been put, not *dropped*, in the bucket cross-ways or in such a manner as to prevent them from falling out or dropping through.

As the case will be tried again, it is proper to notice the question of evidence, as to which his Honor also erred.

The object of the plaintiff was to show the condition of his slave, that he had not recovered from the effect of the blow and was permanently injured. For this purpose it was competent to prove how he acted, how he looked, and of what he complained. In fact this is almost the only kind of evidence by which the condition of body or mind can be ascertained; it is natural evidence or the evidence of facts, as distinguished from personal evidence or the testimony of witnesses; *Best, on the principles of evidence.*

The declarations of a patient to his physician are strong evidence of the state of his health, and only differ from his declarations to a third person, because it is less probable that he will feign or state falsehoods to one, by whom he hopes to be relieved; but this consideration only affects the degree of credit due to such declarations and does not affect their admissibility. Whether expres-

sions of pain are real or feigned, must be determined by the jury. 1 *Greenleaf Ev.* 126.

If it be material to ascertain the mental condition of an individual, his conversation at different times is admissible. Upon the same ground, it being material to ascertain the bodily condition of the slave, his complaints of head ache, when exposed to the sun, and his declarations that he was unable to work in the sun, or to endure hard labor, are admissible. True, one may feign the language of a mad-man, or may utter false complaints of pain, but the law does not on this account exclude what may be the only mode of proof. It is left to the good sense of the jury, connecting the declarations with the acts and looks of the party and other circumstances, to say how far such evidence is to be relied on.

The statute, excluding the testimony of a slave or free person of color against a white man, has no application. The distinction between natural evidence and personal evidence or the testimony of witnesses, is clear and palpable. The actions, looks and barking of a dog are admissible as material evidence, upon a question as to his madness. So the squealing and grunts or other expressions of pain, made by a hog, are admissible upon a question as to the extent of an injury inflicted on him. This can in no sense be called the testimony of the dog or the hog. The only advantage of this natural evidence, when furnished by brutes, over the same kind of evidence, when furnished by human beings, whether white or black, is that the latter having intelligence, may possibly have a motive for dissimulation, whereas brutes have not; but the character of the evidence is the same and the jury must pass upon its credit.

Per Curiam. There must be a *venire de novo*.

LUKE CARTER *vs.* JAMES WOOD.

Where a person sued *in forma pauperis*, and recovered a verdict, but the judgment was for the amount of the verdict only, and not for the costs, he cannot afterwards, upon a rule, have an order that execution shall issue against the defendant for his costs.

While a suit is in progress, the witnesses have a right to demand from the party, at whose instance they are summoned, the payment for their attendance at the end of each term, or as soon as the suit is disposed of. Their claim after judgment is not against the person summoning them, but against the person bound to pay the costs under the judgment, unless the party so bound is insolvent.

The cases of *Clark* v. *Dupree*, 2 Dev. 411, *Office* v. *Lockman*, 1 Dev. 146, and *Standley* v. *Hodges*, Conf. Rep. 330, cited and approved.

Appeal from the Superior Court of Law of Robeson County, at the Spring Term 1850, his Honor Judge SETTLE presiding.

This was a rule which had been served on the defendant to show cause why he should not be taxed with the costs of the plaintiff's witnesses, in a case which had been tried between the same parties. The plaintiff had brought an action of trespass *vi et armis*, *in forma pauperis*, against the defendant, in which there was a verdict for the plaintiff and judgment for the amount of the verdict only. Some of the plaintiff's witnesses had drawn their tickets from the office, brought suits on them before a magistrate, after the determination of the original suit, and recovered judgments, from which the plaintiff appealed to the Superior Court, when the witnesses recovered judgment. And the present plaintiff prayed an appeal to the Supreme Court, but being unable to find sureties the cases were not taken up. The plaintiff paid some of

his witnesses, and some of the tickets still remain in the office unsatisfied. The rule being argued at this term, his Honor discharged the rule, on the ground that a plaintiff, who sues *in forma pauperis*, neither pays nor recovers costs.

The plaintiff prayed an appeal to the Supreme Court, which was granted.

Troy, for the plaintiff.

Strange, for the defendant.

NASH, J. We have listened with pleasure to the argument, submitted to us in behalf of the plaintiff. The case does not, however, properly present the question designed to be raised. That a person suing *in forma pauperis*, in general, neither pays nor recovers costs, has been considered the established law of this State, ever since the case of *Clark* v. *Dupree*, 2nd Dev. 411. But whether under that rule the attendance of his witnesses is embraced has not been decided. The case before us does not present the point. The plaintiff had been permitted to sue *in forma pauperis* and had recovered a verdict. The case states, that judgment was rendered *only* on the verdict. None was asked for against the defendant, for any costs. The notice is to show cause, why "an execution should not issue against him, the defendant, for the costs of the witnesses in the case." Under the act of 1777, ch. 115, Sec. 90, "the party, in whose favor judgment shall be given, &c., shall be *entitled* to full costs" &c. To reap the benefit of this provision, the party must have a judgment, not only on the verdict for the sum awarded him by the jury, but also one for his costs. In general, it is a matter of course for such a judgment to be entered, and, if the case had been silent on the matter, we might have presumed that such was the fact here. But we are not permitted to make any such presumption. We are told none such was

asked for and none such rendered. Whether, therefore, the word "costs" in the act of 1836, 31st ch. 47th sec., which is a transcript of the statute of Henry the 8th., embraces the attendance of the plaintiff's witnesses, we do not feel at liberty to decide. In order to have brought the question before the Court, a motion for a judgment for those costs ought to have been made to the Court, before whom the cause was tried. The case further states, that, after the judgment was rendered, some of the witnesses for the plaintiff warranted him upon their tickets and obtained judgments, which he paid; others he paid without process and some of the tickets are still in the office of the Clerk. The proceedings are had for the purpose of subjecting the defendant to the payment of these several claims, by an execution. In addition to the answer already given, why the Court cannot order the execution as required, it may be said, the plaintiff, as far as the case discloses, was not answerable for any of those claims, not because he was sueing *in forma pauperis*, but because the original suit was ended. While a suit is in progress, the witnesses of the parties have a right to demand from the party, at whose instance they were summoned, the payment for their attendance at the end of each term, or as soon as the suit is disposed of. If they do not choose so to do, they ought to deposit their tickets at each term in the Clerk's office, that they may be regularly taxed in the bill of costs. Their claim, after judgment, is not against the person summoning them, but against the person bound by the judgment to pay the costs under the judgment, unless the party so bound is insolvent. *Office* v. *Lockman*, 1st Dev. 146. *Standly* v. *Hodges*, Conf. Rep. 330. Here, we repeat, there is no judgment for costs. And the judgment of the Court below is affirmed and rule discharged.

Per Curiam. Judgment accordingly.

WALTER F. BURNS *vs.* BENJAMIN ALLEN.

Where A. sold to B. a tract of land, conveyed by a deed containing a covenant for quiet enjoyment, and, upon discovery that a part of the land previously belonged to B., A. offered to pay to B. the value of this part of the land, so as to avoid a suit on the covenant, *Held*, that an action of assumpsit would not lie on this proposition, because B. had not acceded to it.

Appeal from the Superior Court of Law of Anson County at the Spring Term 1850, his Honor Judge SETTLE presiding.

Winston, for the plaintiff.
Strange and *G. C. Mendenhall*, for the defendant.

NASH J. There is nothing in the case which in the opinion of the Court would justify an interference with the judgment below. The defendant sold to the plaintiff a tract of land for a specific sum of money, and the deed contained a covenant for quiet enjoyment. After the conveyance the land was surveyed according to the metes and bounds contained in it; when it was discovered that it covered twenty two acres of land owned by the plaintiff. This fact was communicated to the defendant by a witness in the case, who was requested by him to tell the plaintiff, he did not wish to be run to any costs, but was willing to pay for the land. To other witnesses he stated, he did not wish Burns to sue him; he would do what was right, he was willing to pay the value of the land. The action is in assumpsit and the declaration contains

two counts. The first is on a promise by the defendant, in consideration of forbearance on the part of the plaintiff to sue, to pay the plaintiff the value of the land. The second is on a promise to indemnify the plaintiff for his loss in purchasing his own land. There is nothing in the case to show that the plaintiff and defendant ever entered into any *agreement*, respecting the land, after the execution of the conveyance; or that, after that time, they ever had any communication on the subject. The case presents simply an offer on the part of the defendant to settle in the way indicated by him, without any action on the part of the plaintiff, acceding to it, and without any evidence to show that it was ever made known to him. Neither count in the declaration is sustained. An assumpsit is a contract, which requires the assent of both the contracting parties. This was a mere offer to make one, which might have been withdrawn by the defendant, at any time before it was accepted by the plaintiff. *Routledge* v. *Grant*, 4 Bing. 653.

Per Curiam. Judgment affirmed.

SAMUEL LONG *vs.* JOHN BONNER.

An action of assumpsit for the use and occupation of land will not lie in this State, unless there be an express promise to pay rent.

The case of *Hayes* v. *Acre*, Conf. Rep. 19, cited and commented on.

Appeal from the Superior Court of Law of Perquimans County, at the Spring Term 1850, his Honor Judge Ellis presiding.

The action is assumpsit for the use and occupation of a piece of land belonging to the plaintiff. Plea, non assumpsit.

On the trial evidence was given, that, in pursuance of a decree of the Court of Equity in a cause duly constituted, the land was sold in the latter part of December 1847 by the Clerk and Master, as belonging to the plaintiff in fee, and the defendant was accepted by the Master as the purchaser, and executed bonds for the purchase money, and entered into possession of the premises on the 1st day of January 1848. In April following it came to the knowledge of the defendant, that the plaintiff was not entitled in fee absolutely, but that there was a limitation over to other persons upon the contingency of the plaintiff's death under 21 and without leaving issue; and upon the ground that the plaintiff was still an infant and had no issue, the defendant then applied to the Court of Equity to rescind the contract of sale—which was accordingly done. The defendant thereafter continued to occupy the premises for the residue of the year and made a crop thereon. It is for a reasonable satisfaction for the occupation for the year 1848 the action is brought.

The counsel for the defendant moved the Court to instruct the jury, that the plaintiff was not entitled to recover, upon the ground, among others, that the action would not lie. But the Court refused to give the instruction; and directed the jury, that, even if the defendant were a trespasser on the land, the plaintiff could waive the trespass and maintain this action for compensation in the nature of reasonable rent for the use and occupation of the land, and much more when the defendant entered under the plaintiff or under the Court, acting for him. From a verdict and judgment against him the defendant appealed.

No counsel for the plaintiff.

Jordan, for the defendant.

Ruffin, C. J. Undoubtedly it is incorrect to suppose, that this action could be maintained against a trespasser. It would not lie for the hire of a personal thing against a trespasser; but the owner would have to resort to the action of trover or trespass. If, indeed, a trespasser sell the thing, the owner may waive the trespass and affirm the sale and bring assumpsit for the price as money had and received; and so, for money received by the trespasser for hire by him to another person. But for the trespass itself in taking the thing, or for the enjoyment of it by the trespasser, assumpsit will not lie, as no contract, express or implied, exists between the parties. So, with respect to land, if the trespasser let it and receive rents, we will not say, that he would not be liable therefor as money had and received to the use of the owner. But, for the injury of illegally entering into the land of another and keeping him out, the remedy is by action of trespass for the mesne profits after the owner regains the possession. No action *ex contractu* lies, as there is nothing from which a contract can be implied. That, however,

is not material to the present purpose, as this defendant was not a trespasser, but entered under authority of law upon a supposed or intended purchase of the premises.— The question is, whether the action of assumpsit will lie under such circumstances; and the opinion of the Court is, that it will not.

There are most respectable authorities, that this action cannot be maintained by a vendor against one who entered and occupied under a contract of purchase, after the contract has been rescinded or abandoned, although it might lie upon a parol lease, not reserving a certain rent. Those decisions go on the ground, that compensation for the use of land is in truth rent, and can only arise where there is the relation of landlord and tenant, and that such relation does not subsist where the contract is for a sale and purchase. Hence, the law leaves the parties to their remedies on that contract, or to provide by proper stipulations for what may be just between them upon their rescinding it. And it is somewhat surprising and to be regretted, that provision was not made for the new state of things, when the defendant was discharged by the Court from his purchase, by requiring him to take the land for the year, if the infant's estate should so long continue, at a proper rent. But that point need not be further considered, as it is the opinion of the Court, that in our law assumpsit will not lie for use and occupation of land unless upon an express contract of leasing, and therefore that this plaintiff cannot recover.

It is clear, that at common law it would not lie upon an implied promise, but only an express one. The reason is, that there were higher remedies, namely, debt and distress. *Reade* v. *Johnson*, Co. Eliz. 242. 3 *Woodeson's Lectures* 79. Indeed rent due on a parol lease is a specialty debt, in the administration of assets. *Gage* v. *Acton*, 1 Salk 325. This reason has been said to be technical, and that is true. But that is no ground for holding it to be

insufficient for not allowing the action. The question is, whether the law should imply a promise to pay rent, in order thereby merely to give assumpsit as a remedy, when the law had already provided the others just mentioned. It is plain, that no such implication should be made, unless, for the same reason, a promise may also be implied to pay a sum of money, which the party owed, by bond, by lease, by indenture, or by judgment. The reason against the one is as technical as that against the other: for, in truth, it is the same in each case. If, indeed, there be an express contract to pay rent, then it was held, that assumpsit would lie thereon: and, therefore, when the promise laid in the declaration was admitted by demurrer, or confessed in the plea in bar, or appeared upon evidence upon non assumpsit, to have been expressly made, the plaintiff was entitled to judgment, because the promise was collateral and was to be taken as intended to give this additional remedy. *Dartnal* v. *Morgan*, Cro. Jac. 598, *Acton* v. *Symon*, Cro. Car. 414, *Johnson* v. *May*, 3 Leo. 150. *Mason* v. *Baldam*, 3 Mad. 73. In consequence of that state of the law, it was enacted in England, as a part of St. 11, Geo. 2. C. 19, that, where the agreement is not by deed, the landlord may recover in an action on the case for use and occupation. Since that time the action is common in that country, as founded on the statute. Before it, no instance is found in which it was sustained upon an implied promise. That act is not in force in this State. It is probable it may have been in use formerly or deemed to have been in force here; as it is stated by Judge Taylor, in *Hayes* v. *Acre*, Conf. Rep. 19, that recoveries had been made in our Courts upon implied promises, and, as we have seen, there was no other ground for them. In that case the plaintiff had judgment: but the report is very unsatisfactory, as the whole record was not here, and it does not appear, whether the plea was non assumpsit, or some other bar, or whether, if the for-

mer, an express promise was proved, or whether the point arose on a motion in arrest of judgment. It is possible, indeed, that Judge TAYLOR's opinion was, that a promise might be implied and the action lie on it, as he says that it did not appear from the verdict, whether the action was founded on an express or implied promise, and, consequently, he must be supposed to have thought the plaintiff entitled to judgment in either case. But in both positions, it is apparent, that he was mistaken. For, after a verdict or upon demurrer, every promise laid in the declaration is necessarily taken to be express; and the objection, that one could not be implied, could only arise upon the evidence on non assumpsit, or upon a special verdict, as in *Reade* v. *Johnson*, that there was no special promise, but a leasing for years at a certain rent. In *Hayes* v. *Acre*, therefore, the Court was obliged, in the state of the record, to regard the promise as express; and it may be, that the other Judges rested their opinions on that. Judge TAYLOR was mistaken likewise in supposing that *Mason* v. *Beldam*, which he cited, was an authority, that this action was maintainable at common law upon an implied promise for rent; for the promise was, of course, laid in the declaration as express, and the defendant demurred, and thereby admitted it as laid. In such a case the Court said, in *Johnson* v. *May*, an express promise shall be intended, and not a bare promise in law.

Under such circumstances the Court finds itself wholly unable to sustain this action. It was denied by the common law, and we cannot undertake to give a remedy at common law, which is directly against that law. As far as it ever prevailed here—and that, as far as we have experience, must have been to a very limited extent—it probably proceeded upon some notion, that the act of George 2nd authorised it here. If so, that ground entirely fails at present; because by the Act of 1836, Rev. St. ch. 1, sec. 2, all the English statutes not then re-enacted,

though in use here before, were repealed. It is to be regretted that the act of George 2nd was not enacted here, as it is a beneficial law. But it was not, and the case is, therefore, at common law, and the action does not lie.

Per Curiam. Judgment reversed and *venire de novo*.

THE STATE *vs* WILLIAMSON HAITHCOCK.

A free person of color is chargeable with the support of a bastard child begotten by him on a white woman.

Appeal from the Superior Court of Law of Orange County at the Spring Term 1850, His Honor, Judge Battle, presiding.

Attorney General, for the plaintiff.

No counsel for the defendant.

Pearson, J. The defendant, who is admitted to be a free negro, was charged by a white woman with being the father of her bastard child. His counsel moved to quash the proceedings upon the ground, that the bastardy laws did not apply to such a case. His Honor very properly overruled the motion.

We are at a loss to conceive of any reason, why the defendant should be exempted from the operation of the bastardy laws, merely because he is a free negro.

Free negroes are capable of holding property, they can sue and be sued, and are bound to support their bastard children, whether begotten upon a free white woman or free black woman. They can set up no "exclusive privilege" in this behalf. The counties ought not to be charged with the support of these bastards, until it is judicially ascertained, by exhausting the legal remedy, that the putative father is unable to do so.

The judgment below must be affirmed. Judgment against the defendant for the costs of this Court and a procedendo issued to the Superior Court.

PER CURIAM. Judgment accordingly.

LAW LIBRARY OF THE SUPREME COURT

THE STATE *vs.* ALFRED SMITH.

Where on an indictment, the defendant pleads a former conviction, it is competent for him, to prove by one, who was not a witness on the former trial, what a witness, who was examined on behalf of the State on that trial, deposed to, though that witness was still alive and within the jurisdiction of the Court, in order to shew the identity of the cases.

The case of the *Governor* v. *Roberts*, 2 Hawks. 26, cited and approved.

Appeal from the Superior Court of Law of Columbus County, at the Fall Term 1849, his Honor Judge DICK presiding.

This was an indictment for assault and battery on one John Penny. The defendant pleaded not guilty and former conviction for the same offence. The State proved that the defendant struck one John Penny with a stick in the County of Columbus, within two years before the finding of the bill. The defendant then offered in evidence

the records of the Court of Pleas and Quarter Sessions for Columbus County, from which it appeared that a bill of indictment was found against the defendant, at August Term 1849, charging him with an assault and battery on one John Penny, and, at the same Term, the defendant come into Court and submitted and was fined by the Court, all of which appears by the records of said Court. The defendant alleged, that one James C. Pearce was examined as a witness on the part of the State in the Court of Pleas and Quarter Sessions aforesaid, on the submission of the defendant, and the defendant proposed to prove by a witness, what Jas. C. Pearce swore in the County Court on said submission, and that what Pearce swore to in the County Court would show that it was the same offence. The defendant admitted that Pearce was then living within the County and the jurisdiction of the Court and had not been summoned. The Court rejected the evidence. The jury found the defendant guilty. The defendant moved for a new trial, because the Court had rejected the evidence aforesaid: which was refused and judgment pronounced on the defendant, from which judgment the defendant prayed for and obtained an appeal to the Supreme Court.

Attorney General, for the State.

D. Reid, for the defendant.

NASH J. The defendant is indicted for an assault and battery. He pleaded a former conviction for the same offence. To sustain his plea, he gave in evidence, the record of an indictment against him, in the Court of Pleas and Quarter Sessions of Columbus County, for an assault and battery upon the same person, who is the prosecutor in this case. The record showed a submission on the part of the defendant, and a judgment of the Court. To establish the fact that the assault and battery, for which he was

then tried and punished, was the same for which he is now prosecuted, he called a witness to prove, what a man, by the name of Pearce, who was a witness in that case, had sworn to and that it would show the offence to be the same. It was admitted that Pearce was alive and in the County. This evidence was rejected by the Court. We are not informed upon what ground it was ruled out. If therefore, a wrong reason should be suggested, our excuse must be, the want of such information. We presume his Honor, who tried the cause, was led into error, by applying to the testimony the general rule, that the best evidence the nature of the case admits is always required. Such is the general rule and the reason upon which it is founded will show its improper application here. The law does not require the strongest possible of the fact in controversy, but that no evidence shall be admitted, which, from the nature of the thing, supposes still greater evidence to be in the parties' power to produce; for the reason that it carries with it a presumption, contrary to the intention, for which it is produced. For it is a natural conclusion, that a man will not rely on secondary evidence, having at his command that which is primary, if the latter will serve his purpose. In this case the evidence excluded was not secondary, but primary, of the same grade as that which could have been given by Pearce, the witness on the original trial. The general rule does not exclude evidence, merely because it is not all that might be produced, or the most satisfactory. The best application of this rule, that I have met with, is furnished by a decision of this Court in the case of *Governor* v. *Roberts*, 2nd Hawk 26. The Secretary of State was called as a witness to produce certain papers belonging to the office of the Comptroller. The latter was absent on a journey, and before he left, deposited the key of his office with the Secretary, requesting him to attend to his office while he was absent, and answer any calls. The Comptroller had

not been summoned, and the Secretary testified that he attended, as his agent or on his behalf, with the papers. It was held that although the testimony of the Comptroller would be more satisfactory than that of the Secretary, yet both being oral, were of the same grade, and therefore the testimony offered was competent. The enquiry here was not whether the testimony of Pearce would be more satisfactory to the jury than that of the witness tendered, but whether that of the latter was of an inferior grade. As in Roberts' case, the testimony from either witness was oral and of the same grade and his Honor erred in rejecting the witness offered. 3d Stark. Ev. 391. *Liebman* v. *Pool*, 1st Stark. Rep. 467.

Per Curiam Judgment is reversed and *venire de novo* ordered.

HENRY COOKE ex. WILLIAM BEALE.

Where a guardian to an infant, appointed by a County Court in this State, removes to another State, taking with him a part of the property of the infant, the Court which made the appointment has the right to remove him, without notice, and appoint another in his place.

Appeal from the Superior Court of Law of Hertford County, at the Spring Term 1850, his Honor Judge Ellis presiding.

W. N. H. Smith, for the plaintiff.
Bragg, for the defendant.

NASH J. The plaintiff had, by the County Court of Hertford, been appointed guardian of some minor children. Subsequently he removed into Virginia, near the line, and took with him a part of the slaves belonging to his wards, and kept them in his own service and hired out the remainder in this State, and duly made his returns to Court. Upon these facts and without any notice to the plaintiff, the County Court of Hertford removed him from his guardianship and appointed the defendant in his place. This was at the November Term 1848. The order of the removal is in the following Terms: "It appearing to the Court that Henry Cooke, guardian, &c. hath removed out of this State, and, without the order of this Court, certain slaves the property of his said wards, on motion it is ordered by the Court, that said Henry Cooke be removed from his said guardianship." At the same Term the defendant, Beale, was appointed and gave the necesary bonds. An application was subsequently made by Cooke, the plaintiff, to remove Beale, the defendant, upon the ground that the former had been improperly removed, and to appoint him, Cooke, which was accordingly done. Beale appealed to the Superior Court, where the order of the County Court was affirmed and the defendant appealed to this Court.

The power of County Courts within this State, in appointing and removing the guardians of minor children within their respective Counties, is full and complete, under the act of 1836, ch. 54, sec. 2 and 18. By the latter section, a discretionary power is given to remove, when, in their opinion, the guardian mismanages the estate of his ward. This power, however, is not without its limits and bounds—it is not an arbitrary one, to be used to the oppression and wrong of the citizen, but to be used for the protection of minors and their estates. This Court has no right to interfere in the exercise of a purely discretionary power by an inferior tribunal, unless brought

under review by an appeal. But, when it appears from the record, that they have committed an error in law and exercised a power not granted to them, the Court will interfere and correct the evil. In the act of 1836 there is no express limitation of the power of the County Court, but a limitation necessarily arises out of the nature of the appointment, and the duties to be performed by the Court, in seeing that justice is done to the minors. By the 2nd Sec. the power to appoint is given and also the right "to take cognizance of all matters concerning orphans and their estates." Various regulations are made, as to the manner in which guardians shall manage the estates of their wards, renew their bonds, and make their annual settlements. And all these regulations it is the duty of the Court to enforce. This obligation implies, that the person appointed should be, at the time of his appointment, within the control of the Court, that is within the reach of its process. For, by the 7th Sec. it is made the duty of the Clerk of the Court, in which the appointment is made, to issue, *ex officio*, a notice to every guardian, who neglects to renew his bond, as required by law, "*in whatsoever County he may reside*," &c. If the Court may appoint an individual a guardian, who is not a resident of the State, how will it be in their power to discharge their duties, or see that he executes his? If after making the appointment they leave the State, where is the limit? A man living in Vermont or in Minesota would be as legally eligible, as one residing in Virginia, South Carolina, or Georgia. From the nature of the trust, then, we conclude, that a just construction of the act of 1836 requires that the person appointed to the guardianship of an orphan must be a resident of the State. When Mr. Cooke was appointed he did reside within the State, and it was therefore a proper appointment. But the same reasons, which require a residence to receive, requires a residence to continue, the guardianship. And in re-

moving him the Court was performing a duty and obeying the law. The only objection is that no notice was given to him. Was that requiste? We think not. We are of opinion that by the very act of removing, with a view to a permanent residence out of the State, he waived the necessity of a notice and authorised the Court to act without it. If in such case a formal notice was necessary, much injury might result to the orphans. The act of 1836 evidently proceeds upon the ground, that cases might occur, requiring prompt action on the part of the Court. By the 18th Sec., they are authorised to act upon their own information as well as upon the information of others. And when, as in this case, the fact upon which the conclusion of law is bottomed, is not controverted, but admitted, the necessity of a notice is taken away. But Mr. Cooke not only removed himself but took with him a part of the slaves of his wards. Now if a part, he might carry the whole, and if he could carry the slaves to Virginia, he could carry them to Ohio or Indiana or any where else, where slavery is not permitted. It is no answer to say, that he has given bond for the security of the property, and that his sureties will have to make good any loss the wards may sustain. So they are, and equally so are they bound, if he does not make his anunal returns, or renew his bonds, or in any manner mismanages the estate; yet for all or any of these omissions on his part, the Court may remove him. But further, it is the duty of the Court to see that the property itself is safe, and that it shall not be carried beyond their jurisdiction. The Court then acted right in removing Mr. Cooke from the guardianship, and, of course, were at liberty to appoint Mr. Beale or any other person, who in their opinion was qualified to receive it. The object of the action of the Court, under the proceedings we are now considering, is to declare the appointment of Mr. Beale to the guardianship to be void, because there was already a regular guardian—in other words, to declare

Mr. Cooke still the guardian. We have already said the appointment of Mr. Beal was not void, but legal. Upon the order of the County Court repealing the order appointing the defendant guardian, he appealed, and his Honor, before whom it was heard, held and so adjudged, that the order removing Cooke from the guardianship was not void, for want of notice to him, but that he had been removed without sufficient cause. Where a party has right of appeal and exercises it, the appellate Court is at liberty and is bound to look to all the circumstances contained in the case, and here, we are of opinion, there was sufficient ground for removing Cooke. It follows that the appointment of Beale was proper, as it is admitted he was a suitable person to be appointed.

There was error in the judgment of the Superior Court, which is therefore reversed and judgment rendered for the defendant Beale.

Ruffin, C. J. It is unnecessary to consider, whether there was any irregularity in the order removing Cooke from the guardianship of the infants, for the want of notice to him or any other reason: inasmuch as such irregularity, if there were any, is immaterial to the case as it now exists. Upon the subsequent motion of Cooke, in the County Court, to rescind the first order, by which he was removed and Beale appointed, both of those persons were before the Court, and it was then competent to hear the whole matter upon its merits, and it was so heard.—The decision was in favor of the motion, and removed Beale and restored Cooke to the guardianship, notwithstanding he, Cooke, then resided in Virginia. From that decision Beale appealed, as he was entitled to do, by the express provision of the Act of 1777; and on hearing the parties on the merits in the Superior Court, although it was not alleged that Beale was not a good guardian and a fit person for the office, his Honor held, that Cooke also

was a suitable person therefor, and that, for the quiet and security of the infants, it was expedient to remove Beale and re-appoint Cooke as the guardian; and he made the order accordingly, from which Beale again appealed. As the case stands at present, then, the question is simply, which of these two persons the interests of the infants require to be appointed their guardian? Upon that the Court cannot doubt: for, however well qualified for the office one may otherwise be, it is a conclusive objection to his appointment, that he is not a citizen of this State, but an inhabitant and citizen of another State. In like manner, his removal from this State, after having been appointed a guardian, raises an equally strong objection to continuing him in the office, and is a good cause for taking it from him and giving it to another. A guardian ought always to be amenable to the process of the Court, by which he is appointed, in order that proper and prompt enquiry may be made whether he is taking due care of the infants, their education, and estate; and, when Cooke changed his domicil from this State to another, the Court was bound to remove him for that cause, and for that alone, if there were no other. The orders in the Superior Court must therefore be reversed, and the case remanded with directions to reverse the order of the County Court, from which Beale appealed, and to issue a *procedendo* to the County Court to refuse the motion of Cooke and to let the appointment of Beale stand.

Per Curiam. Ordered accordingly.

DOE ON THE DEMISE OF WILLIAM W. PRICE ex. JOHN HUNT & AL.

On a separate judgment against one partner for a partnership debt, only the interest of that partner, in any portion of the partnership property, can be sold by execution.

Appeal from the Superior Court of Law of Guilford County, at the Spring Term 1850, His Honor, Judge BATTLE, presiding.

Morehead, for the plaintiffs.
Iredell, for the defendants.

NASH, J. The case is as follows: John H. Bennett and Stephen R. Neil were partners in trade and as such owned the land in dispute. Bennett lived in Guilford in this State, where their business was carried on. Neil lived in Virginia. The firm owed a debt, secured by note executed by both the parties, and an action was brought upon it against Bennett alone, a judgment obtained, and at the execution sale the defendants became the purchasers. The sheriff conveyed to them the whole tract, and their deed was duly proved and registered. After this, another creditor of the firm sued Neil, the other partner, by attachment, which was levied upon his interest in the same tract of land, obtained his judgment and at the sale of the sheriff under an execution duly issued, the plaintiff became the purchaser and the sheriff made him a conveyance for the land. The action is brought by the plaintiff

to recover his share of the land. Upon the case agreed, his Honor below was of opinion the plaintiff could not recover and rendered judgment for the defendant.

In the opinion of his Honor we do not concur. The only question presented is, what interest did the defendants acquire by their purchase? Did they thereby acquire the legal title to the whole tract, or only the interest of the partner Bennett? If the former, then very clearly the judgment below was right, and the plaintiff could not recover. If the latter, then the plaintiff was entitled to his judgment. The land in question was partnership property, held by the partners Bennett and Neil, not as tenants in common, but as joint tenants. *Baird* v. *Baird's heirs*, 1st Dev. and Bat. Eq. 538. When a judgment was obtained against one of a firm, it was for a long time doubted how the sheriff should proceed; whether he could take the property of the firm, or not. It is now settled that the sheriff may seize and sell the *interest* of the debtor against whom the execution is sued. What that interest is or may be, it is, in many cases, impossible to ascertain, until a final adjustment of all the partnership concerns. The purchaser at such sale must take such interest as the partner had; he could acquire no more. Story on Partnership, Sec. 260, 1, 2, 3. In the case before us, the judgment, under which the defendants claim the land, was against Bennett, and, although the Sheriff's deed covers the whole tract, in truth it conveyed to them nothing but the interest Bennett had. The sheriff could seize nothing more, and of course he could sell and convey nothing more. If he could, the purchase would by the sale have acquired what was not in Bennett, either in law or Equity. He had only an undivided interest and which could only be divided by first freeing the land from the partnership debts. And the purchaser must take it in the same manner the debtor himself had it, and subject to the rights of the other partner Neil. *Skip* v. *Harwood*, 1st Vy. St 239. Story on Part-

nership 261. in note. It makes no difference in this case, that the debt was a partnership debt; the judgment was a separate one againt Bennett, to which Neil was no party. *Jackey* v. *Butler*, 2nd Ld. Ray. 871. Collier on Partnership, 474. Nothing but the interest of the judgment debtor being sold, that of the other partner, Neil, was subject to a like sale on a judgment against him; and the purchaser under the execution became a tenant in common of the land with the defendants, subject to the Equities existing between them, as respectively representing the original partners. With these Equities we have now nothing to do. Some stress seems to be laid upon the fact, that, at the time the attachment issued against Neil, Bennett, the other partner, was residing in Guilford County. We do not consider this circumstance as affecting the question. Bennett had no farther interest in the land in question; and though he might have been again sued by every creditor of the firm, they could have no farther redress against the land as to his interest in it. To reach that of Neil it was necessary to sue him; he was in Virginia, but under the attachment he could still be made liable. The only effect of a recovery by the plaintiff in the present action is to admit him into the possession of the land in controversy, as a tenant in common with the defendants.

The judgment below must be reversed and judgment be rendered for the plaintiff.

Per Curiam Judgment accordingly.

DEN ON DEM OF JOHN BANNER & AL. vs. JOHN CARR.

In an action of ejectment, where the plaintiff declares, in a single count, upon the *joint and several demise* of different persons, he must be non-suited.

The cases of *Hoyle* v. *Stowe*, 2 Dev. 318, and *Bronson* v. *Paynter*, 4 Dev. & Bat. 393, cited and approved.

Appeal from the Superior Court of Law of Stokes County, at the Spring Term 1850, His Honor, Judge BATTLE, presiding.

Morehead and *Kerr*, for the plaintiff.
Iredell, for the defendant.

PEARSON, J. This was an action of ejectment.

The declaration has but one count, which alleges that a *joint and several* demise was made on the 11th April 1845, by John Banner, Nathaniel Moody, John Martin and Fleming Priddy, to the plaintiff, for the term of ten years from them next ensuing, &c. Upon the trial, it appeared, that one of the lessors had no title. Whereupon his Honor intimated the opinion, that the plaintiff could not recover, and a non-suit was submitted to.

Hoyle et al v. *Stowe*, 2 Dev. 318, which is cited and approved in *Bronson* v. *Paynter*, 4 Dev. and Bat. 393, is in point and fully sustains the opinion of his Honor. It is there held, if one of the lessors in a joint demise has no title, the plaintiff cannot recover, "for there is neither a joint right to convey the land, nor a joint right to possess it, or to let the possession."

The plaintiff alleges a joint title in his lessors. The jury cannot separate the title and find for the plaintiff against his own allegation. So one, who has no title, would be let into possession with the other lessors.

The allegation, that the demise was made by the four lessors severally as well as jointly, does not obviate this objection, and makes the matter worse, for the pleading is faulty, for uncertainty, which is ground for demurrer. A party must always set out his title, and when he claims a particular estate (one less than a fee simple,) he must show when it began, how it is derived, and its limit or quantity of interest. As it is expressed in the books of pleading, "the *commencement* of every particular estate must be set out." Stephen's pleading 306; Coke on Littleton, ch. 3. 3 b.

This plaintiff derives his title under a lease from four lessors. It is left uncertain, whether the lease was made by them jointly or severally. The inference is that it was made jointly, and, at the same time, severally. This, it seems to us, involves an absurdity. At all events it is too uncertain to be allowed in good pleading.

It is said, that the action of ejectment is a creature of the Courts, contrived to effect the ends of justice. That is true, but it does not furnish a reason for allowing "this creature" to do violence to the rules of pleading.

Per Curiam. Judgment affirmed.

WILLIAM BOWMAN vs. PATRICK FOSTER.

Where a *certiorari* is returned to Court, no proceedings can be had on it, until notice of its return has been given to the person, against whom it issued.

Where a party, who is brought in by *certiorari*, may, upon motion, on the ground of irregularity, have the proceedings dismissed, but he waives that motion and submits to plead to the action, he has a right to do so.

The case of *Bender* v. *Askew*, 3 Dev. 150, cited and approved.

Appeal from the Superior Court of Law of Guilford County, at the Spring Term 1850, His Honor, Judge BATTLE, presiding.

The defendant gave his bond to one Peebles for $31 34, payable September 21st 1841, which was endorsed after it fell due to James McNairy, the intestate of the plaintiff. In February 1846 the plaintiff gave the bond to a constable to collect, and on the 14th March 1846 a justice of the peace gave judgment for the defendant on a warrant on the bond, upon the allegation by the defendant and evidence, that it had been paid before the assignment. On the 15th of October 1848, the plaintiff obtained a *recordari* upon his affidavit, that the witness, who gave evidence of the payment, was a person of doubtful character, and that the plaintiff believed his testimony to be false, and that the bond was unpaid and still due: and, farther, that the constable omitted to give him any information of the judgment, and that he had no knowledge thereof, until the Spring or Summer of 1848.

The proceedings were brought into Court in October 1848, and, without any notice served on the defendant, there was an order entered at the next term, that the

judgment was set aside, and a trial in Court awarded: and at the succeeding October term 1849 the plaintiff, for the want of a plea, took a judgment by default final for the debt and interest according to specialty, and thereon issued execution. At spring term 1850 the defendant moved the Court to set aside the judgment and execution, and allow him to plead. In support of the motion he made an affidavit, that no notice of the *recordari* had been given to him, and that, until the sheriff came with the execution, he was entirely ignorant of any thing having been done in the matter, after the judgment had been given by the magistrate, and also that he paid the debt to Peebles while he held the bond. A rule was accordingly granted, and on service thereof the plaintiff showed cause against it by his affidavit, that he still believed the debt had not been paid, but was due, and, also, that from the length of time the *recordari* pended, before entering the judgment, he inferred, that the defendant had notice of it in fact. The rule was made absolute, and by leave of the Court the plaintiff appealed.

Iredell, for the plaintiff.

Morehead, for the defendant.

Ruffin, C. J. The purposes of justice require, that judgments by default should be under the control of the Court at all times, and be set aside, when signed irregularly and against the course of the Court, when there was no regular service of process, or other due notice to the party, and without his appearance. *Bender* v. *Askew*, 3 Dev. 150. The oath of this person is positive, that he had no information of any step taken in the matter for nearly four years after judgment given in his favor; and there is nothing in the record in opposition to that statement. It follows, necessarily, that the judgment could not stand against him. When set aside, the defendant

might, indeed, have insisted on the *certiorari* being dismissed, as having been improvidently granted. For, it was the plaintiff's own look out, that his agent should serve him faithfully; and, moreover, his delay in making enquiry into the matter, until the expiration of two and a half years after the judgment against him, constituted such laches, as ought to preclude him from this remedy. The defendant, however, did not insist on that, and was content to be admitted to plead, averring the merits to be with him; and to that there can be no just objection.

PER CURIAM. Judgment affirmed.

SAMUEL C. BENJAMIN *vs.* REBECCA TEEL.

In a controversy respecting the probate of a will, any person who is entitled in interest, may become an actor. The course is to state on the record such matter as shews on which side the person becomes an actor, so as to shew distinctly, whether he may in the result be entitled to or liable for the costs.

Appeal from the Superior Court of Law of Martin County, at a Special Term in February 1850.

A paper, purporting to be the will of Drury Teel deceased, was offered for probate by Benjamin, the executor, and its validity contested by the widow of the party deceased. The County Court ordered an issue, *devisavit vel non*, to be made up, and also a notice to issue to Jas. L. Teel and Mary Teel, the heirs and next of kin of the deceased, to come in and see proceedings. Those persons were infants, and a guardian *ad litem*, was appointed for them. The issue was afterwards tried and found against the will, and the executor appealed. In the Superior Court a motion was made on the part of the executor to set aside the issue,

upon the ground that the widow was not a party in interest, and that it ought not to have been made up at her instance. That was opposed on the part of the infants; on whose behalf the guardian moved that they should be admitted to contest the will as parties to the issue. Thereupon, the Court denied the motion of the executor and allowed the other; and the executor appealed.

B. F. Moore, for the plaintiff.
Biggs, for the defendant.

RUFFIN, C. J. Persons, to whom notice to see proceeding is given, are bound by them, and are, in the view of the Court of probate, parties to the proceedings, as far as there can be said to be parties in such a controversy. It is true, they may not be actors in the cause, and therefore not liable to costs. But, unless they do something to preclude them, they may become active at any time before the sentence is pronounced; for, until that is done, any party in interest is entitled to be heard for or against the script. The usual manner of effecting that with us has not been by a new and distinct allegation for or against the will; but by becoming a party to the issue, made up under the direction of the Court, according to the Statute. For, if such allegation were made, it would not entitle that person to an issue to be tried separately, as that might lead to opposite verdicts on the same matter; but the course is merely to state on the record such matter as shows on which side the person becomes an actor, so as to show distinctly whether he may in the result be entitled to or liable for the costs. The proceeding being *in rem*, any person may intervene to protect his interest while the thing continues *sub judice*.

PER CURIAM. Orders affirmed with costs.

WILLIAM TOW AND WIFE *vs.* GILBERT ELLIOTT.

Where a person, settling with a guardian, paid him, by mistake, more money than he was entitled to receive, *Held*, that he was entitled to recover the excess from the guardian individually.

Appeal from the Superior Court of Law of Pasquotank County, at the Spring Term 1850, his Honor Judge ELLIS presiding.

This was an action on the case.

It was in evidence on the part of the plaintiff, that some years since, one Thomas Lister, deceased, became the guardian of Margaret, Richard, and Elizabeth Lister, infant heirs of John Lister, deceased, and as such received a considerable amount of funds belonging to his said wards. At the death of the said Thomas Lister, this defendant became guardian to said Margaret, Richard and Elizabeth; and the wife of the plaintiff, then the widow of the said Thomas Lister, having duly administered on the estate of the said Thomas Lister, paid over to this defendant, without suit, the amount supposed to be due the said wards, amounting to some two thousand dollars: it was also in evidence from a reference and report made in this case, that the said administratrix of Thomas Lister paid to the said defendant, more than was justly due his said wards, by the sum of two hundred and five dollars, on the 3rd day of September 1849. To recover back this sum this suit was brought.

The defendant insisted that the plaintiffs had no right to recover at all, but if they had, they could not recover against him individually in this form of action.

His Honor being of opinion with the plaintiffs, there was a verdict and judgment for $211 15, of which $205 is principal. From which judgment the defendant appealed.

A. Moore, for the plaintiffs.
Heath, for the defendant.

Nash J. The action is brought to recover a sum of money paid to defendant by mistake. One of the most familiar heads in text writers on actions to recover money, is that of mistake. In this case it does not seem to be denied by the defendant, that the money claimed is justly due to the plaintiffs. It is questioned so feebly, as to amount nearly to an admission. He insisted, if they had a right to recover at all, they could not recover against him individually in this form of action. Why not? He had received the money through mistake, and it was still in his hands. He was the only person against whom the action could be brought. His receiving it as guardian could make no difference, as against the plaintiff; it was not the money of his wards, and was in fact held by him for the use of the plaintiffs. We must suspect the claim was resisted and the action brought to furnish the defendant with a satisfactory voucher of a proper disbursement of so much of the apparent funds of his ward. The action is properly brought in assumpsit.

Per Curiam. Judgment accordingly.

ROBERT S. BURNEY *vs.* RUFUS GALLOWAY.

An obligation in these words, 'On or before the first day of January next I promise to pay to Robert S. Burney or order $160, for the hire of a negro by the name of Abram, and the use of two full crops of boxes on Moore Creek. Witness," &c., is not a conditional obligation.

Appeal from the Superior Court of Law of Brunswick County, at the Spring Term 1850, his Honor Judge SETTLE presiding.

The declaration is in debt on a single bill under seal for $160, and *non est factum* pleaded. On the trial the instrument appeared to be in these words: "On or before the 1st day of January next, I promise to pay to Robert S. Burney, or order, one hundred and sixty dollars, for the hire of a negro by the name of Abram and the use of two full crops of boxes on Moore's Creek. Witness my hand and seal this 15th day of———— 1848." The defendant thereupon moved for a non-suit, because the bond produced was conditional and only bound the defendant to pay the money, provided the plaintiff let him have the use of the negro and two crops of turpentine boxes, whereas the plaintiff gave no evidence on those points, but declared on the bond as obliging the defendant absolutely to pay the money. But the Court refused the motion, and the plaintiff had a verdict and judgment; and the defendant appealed.

No counsel for the plaintiff.
Strange, for the defendant.

RUFFIN, C. J. It is true the word "for" may make a condition; and it does so, when each party is subsequently to do some act, and, upon the sound construction of the instrument, it is apparent, that the act on the part of the party suing ought to precede or concur in point of time with that stipulated by the other party. Many cases were cited in the argument for the defendant; but in all of them the contracts were so expressed as to appear to be executory on both sides, and amount to stipulations for mutual acts *in future*, which were, at the least, to be concurrent. Cases of that kind however have no application to one like the present. If the consideration, mentioned in the bond, was past, the obligation of the defendant to pay the money was, of course, intended to be absolute.—But if it cannot be collected from the instrument—to which alone we are to look for its meaning in this respect—that the defendant had already had the use of the negro and boxes, still there is nothing to show, that he was to have them before the day on which he was to pay the money. Suppose the expression in the bond had been "for value," without adding the word "received:" it is plain it would stand indifferent, whether the value had been received before, or was to be received after, the making of the contract. Therefore it could not be said that the instrument purported to be conditional. But admitting that it could be construed as providing for value to be received, yet that provision could not be deemed a condition to be performed by the plaintiff, before he could have a cause of action, since neither the kind of value, nor the period of rendering the benefit, is specified. Now, it is not stated in this instrument, when the hire of the negro was to begin, nor for what period it was to continue. We are told at the bar, that the phrase "crops of boxes," means as many pine trees, prepared for making turpentine, as one hand will attend during a season. But, taking that to be so, it cannot be told what years the de-

fendant was to have the boxes, namely, whether in 1848, or whether a crop for one hand in that year, and for another in some other year. The words were probably intended merely to show on what transactions between the parties this money was due: namely, those of hiring a particular negro and the rent of certain turpentine boxes, and not to enter into any particulars of such hiring and renting. The case, therefore, falls within the common rule, upon which stipulations are deemed independent, when the one party engages, for example, to pay money at a certain day, for which the other party is to do other acts, which may or may not be performed before or at that day.

PER CURIAM. Judgment affirmed.

JAMES C. HOLMES vs. ALFRED JOHNSON.

Where a society exists, which has its written rules and bye-laws, it is not competent to shew by parol testimony, that there are other rules and usages, independent of those contained in such written rules and bye-laws.

Where the general character of a party in an action of slander is attacked and several witnesses are introduced for the purpose of sustaining the attack, the Act of Assembly, requiring only two witnesses to a fact to be taxed in the bill of costs, does not apply. It is a case for the exercise of the discretion of the Judge presiding at the trial.

The case of *Hoyle* v. *Cowen*, 1 Hay. 21, cited and approved.

Appeal from the Superior Court of Law of Sampson County, at the Spring Term 1850, his Honor Judge SETTLE presiding.

The action is for slanderous words spoken, imputing to the plaintiff the crime of stealing some watch guards and studs from the shop of the defendant in the town of Clinton; and was tried on the pleas of not guilty and justification. The plaintiff called a witness, who stated that he, the witness, the plaintiff and defendant were members of a society called "A Lodge of Odd Fellows," which met in Clinton; and that certain charges were preferred in the Lodge against the plaintiff by some member, and the witness and two other members were appointed a committee to investigate the same and make a report to the Lodge; that, in the discharge of his duty on the committee, the witness called on the defendant to state what he, the defendant, knew upon the subject of those charges, and the defendant gave him the information, as requested; and that after getting through with that matter, the defendant added, that there were other suspicious matters against the plaintiff, and then went on to accuse him of stealing watch-guards and studs from the defendant's store. Another witness for the plaintiff deposed, that he also was a member of the same Lodge, and an intimate friend of the defendant, and that on a certain occasion, when the defendant visited the witness, while the latter was very sick, they were engaged in a conversation respecting Odd Fellowship and the said Lodge, and the defendant stated to the witness, that he suspected the plaintiff of taking his studs and watch-guards, and also that the plaintiff was suspected by others of having stolen other articles at different times; and that the witness understood the communication to be made in confidence, though the defendant did not express himself to that effect.

The defendant then gave in evidence a printed pamphlet purporting to be the rules and bye-laws of the said Lodge, regulating the duties and conduct of the members of the society; and among them was one requiring any member,

who knew any thing against the character or integrity of another to accuse him to the Lodge, and directing that thereupon a committee should be appointed to investigate the matter.

The defendant offered further to prove by a witness, that the Order of Odd Fellows is a society for charitable and benevolent purposes, and that, by the principles and usages of the Order, it was the moral duty of every member to keep the Lodge pure: to admonish any other member of any danger to his morals or his character or estate: and if any member did, or was suspected of having done, an improper act, to give information thereof to the Lodge and also to communicate the same to the members individually; and that those principles and usages exist, independent of the written and printed rules and bye-laws, as a kind of common law of the order, treasured up in the bosoms of its members. But the Court refused to receive the evidence: and the counsel for the defendant excepted thereto, and after a verdict and judgment against him the defendant appealed.

Strange for the plaintiff.
W. Winslow for the defendant.

Ruffin, C. J. The execution is restricted to the question of evidence; and that, therefore, is the only point in the case. The Court think his Honor's decision on it right. The object of the evidence seems to have been to show, that, as a member of the Society mentioned, the defendant was bound to give the information he did to the two witnesses, and thence to insist, that the communications were privileged. But the evidence was either unnecessary or insufficient to establish such a privilege; and in either case it was not erroneous to exclude it. For, if by the general law of the land applicable to the relation existing between those several persons, the de-

fendant was privileged to accuse the plaintiff to his brother members, he could have the full benefit of the defence, independent of the supposed regulations of the society. If however, those regulations were material to the question, it seems plain that they would not have been established by the evidence rejected. The defendant had the full benefit of such as had been adopted by the society. One of them was directly applicable to this subject, and required the members to make known to the society, at its meetings, offences committed by their fellow members, for the legitimate purpose of having them enquired into and punished according to the rules. The defendant, however, insisted further, not that there was any other law of the order on the subject, but that there were certain usages and principles, supposed to be treasured up in the bosoms of its several members, that made it a moral duty of the defendant to make those charges on the plaintiff. It seems to the Court, that such evidence is altogether too vague and unsatisfactory to authorize the finding from it any regulation of the society. The origin and antiquity of the society are not stated, and we must suppose that it has lately sprung up, and has expressly adopted such bye-laws as were decreed necessary for their goverment in addition to the duties imposed by the law of the Country. It is idle to talk of a common or traditional law, applicable to a matter like this and peculiar to this Lodge; and it is obvious that the attempt was to get from the witness his opinion of the moral duty of the defendant under the circumstances, instead of stating what the law of the society, as adopted and recorded, required of the defendant as a member of the association. Such evidence could have no legitimate effect on the minds of the jury, but might mislead, and therefore was properly rejected.

Upon the trial the defendant attacked the general character of the plaintiff, and to that point examined nine

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witnesses. In opposition thereto, and in support of his character, the plaintiff examined about thirty witnesses. After the verdict the defendant moved, that in taxing the costs only two of those witnesses should be allowed to the plaintiff. But the presiding Judge thought they were necessary or proper to the plaintiff's case under the circumstances, and refused the motion. The Court holds, that the Act of 1783, which provides that the party cast shall be obliged to pay for more than two witnesses to prove a single fact, is not to be construed so strictly as not to allow of more than two witnesses in any case, or always to tax the party summoning them with all but two. The general purpose of the statute is to give to the gaining party all such costs as are necessarily or reasonably incurred by him, but not to put it in his power to oppress the other party by wantonly accumulating costs. Commonly two witnesses to any one fact are sufficient to establish it. But others may become necessary and almost indispensable, in order to counteract the testimony of witnesses offered on the other side; and in such a case the losing party is not necessarily exonerated from the payment of such additional witnesses, but may be taxed with them. *Hoyle* v. *Cowan*, 1 Hay. 21. That is peculiarly applicable to a case like the present, where the point involved was the general character of the party, (which cannot strictly be called a single fact) and it was necessary to counteract many witnesses, adduced on the opposite side. Upon such a question much must depend upon the number and respectability of the witnesses and their opportunities of knowing the party: and therefore it is a very proper case for the exercise of a discretion of the Judge presiding at the trial. In the present case this Court must take it for granted, that his Honor deemed the witnesses useful and proper, and that they were truly called for the purposes of justice and not to oppress the defendant; and under those circumstances the Court cannot interfere with his decision.

Per Curiam. Judgment affirmed.

WILLIAM SATTERFIELD *vs.* CHARLES SMITH.

Where, before a hiring commenced, a paper writing was read, purporting to contain the terms of the hiring, and also before the hiring commenced, the crier in an audible voice announced other terms, *Held*, that the hirer or his agent had a right to make such alteration.

Appeal from the Superior Court of Law of Perquimans County, at the Spring Term 1850, his Honor Judge ELLIS presiding.

Heath and *Jordan*, for the plaintiff.
A. Moore and *Burgwin*, for the defendant.

PEARSON, J. The action was for a breach of a contract for hiring. One of the terms of which was (as the plaintiff alleged,) that "the negro should not be employed at a fishery or sent by water."

The plaintiff read in evidence a paper writing, purporting to contain the terms of hiring, one of which was, that the negro should not be employed at a fishery or sent by water, and proved by several witnesses that the paper was read aloud by the crier, before the hiring commenced.

The defendant called several witnesses, who swore that no such paper was read in their hearing, and that the crier, just as the bidding commenced, said in a loud voice, "the negro can be sent by water or put at a fishery, at the risk of the hirer." He also called several other witnesses, who swore that after the paper was read, and before the hiring commenced, the crier said in a loud

voice, "the negro can be sent by water or put at a fishery at the risk of the hirer." This last evidence was objected to, but was admitted.

The defendant employed the negro at a fishery; but there was no evidence of any damage.

The Court charged, that, if the jury believed that it was one of the terms of the contract of hiring, that the negro should not be employed at a fishery, as alleged by the plaintiff, he was entitled to recover nominal damage. But if the person hiring, was, by the terms of the contract, allowed to put the negro at a fishery "at his risk," as the negro had not been injured, the plaintiff could not recover. He also charged, that notwithstanding the paper had been read aloud, it was competent for the plaintiff or his agent to change the terms, and if this was done before the hiring, the plaintiff could not recover.

The case does not set out upon what exception the plaintiff appealed.

There is no error in the charge and we are at a loss to see upon what ground the evidence was objected to. "*The paper*" which was read before the hiring began was not adopted and agreed on by the parties as pre-appointed evidence of the terms of hiring, and the rule that a written instrument shall not be contradicted, added to, or varied by parol proof, has no sort of application. The paper contained a mere proposal of terms, and when it was found, that those terms were not accepted, the plaintiff or his agent had a right to vary them as they thought expedient.

PER CURIAM. Judgment affirmed.

SAMUEL TOPPING. *vs.* NATHAN G. BLOUNT.

The sole purpose of the Act of 1827, relating to indorsers, was to turn the conditional contract between the indorser and the holder of a bond, into an unconditional one. It was not intended to charge the indorser, as if he had executed bond as a co-obligor, or upon an indorsement without consideration or to deprive him of the benefit of the Statute of limitations. The cases of *Williams* v. *Irwin*, 3 Dev. & Bat. 73, and *Ingersoll* v. *Long*, 4 Dev. & Bat. 293, cited and approved.

Appeal from the Superior Court of Law of Beaufort County, at the Spring Term 1850, His Honor, Judge BAILEY, presiding.

The plaintiff declared in several counts in assumpsit, but the only question made in the bill of exceptions arises on a count, charging the defendant as endorser of a bond for $652,22, executed by Littlejohn Topping and William Holland, on the 22nd of January 1837, and payable twelve months after date to Blount. The pleas were non assumpsit and the statute of limitations.

On the trial the evidence was, that, about the time the bond fell due, the defendant endorsed it in blank and passed it for value to Susan Jones, and that she held it until the 20th day of November 1845, and received various payments thereon, which reduced the sum then due thereon to $555 66: and that on that day Littlejohn Topping and the plaintiff executed a bond for the said sum of $555 66 payable to Susan Jones, which she accepted in discharge of the former bond, and thereupon directed her agent to deliver the first bond to the said Littlejohn Topping or to the plaintiff, and the agent shortly thereafter delivered it into the hands of the plaintiff; Littlejohn Top-

ping, the principal debtor, failed to make any payment on the second bond, and on the 13th of August 1847 the plaintiff discharged the same by giving Mrs. Jones a bond for the sum due; executed by himself and another person as his surety. The plaintiff then filled up Blount's blank endorsement by making it to himself, and brought the present action on the 29th of September 1847.

The counsel for the plaintiff thereupon moved the Court to instruct the jury, that, if they believed the evidence, the plaintiff was a purchaser of the bond sued on, and had a right to fill up the endorsement in his own name, and, so was entitled to recover thereon, unless the action was barred by the statute of limitations. And, as to the latter point, the counsel insisted, that Littlejohn Topping, by giving the bond of November 20th 1845, in renewal of that sued on, acknowledged the latter as then constituting a subsisting liability on him, which implied a promise to pay it; and that, by such acknowledgement and promise of the principal, the case was taken out of the statute of limitations in respect to Blount, as endorser and surety. The Court instructed the jury, that, whether the transaction between the plaintiff and Susan Jones or her agent were a purchase of the bond or not, the defendant was protected by the statute of limitations, and that the acts of Littlejohn Topping mentioned were not sufficient to renew a liability of Blount as endorser. The jury found for the plaintiff on the first issue and for the defendant on the statute of limitations; and the plaintiff moved for a *venire de novo* upon the ground of misdirection, which was refused, and he appealed.

Biggs, for plaintiff.

J. W. Bryan, and *J. H. Bryan*, for the defendant.

Ruffin, C. J. It is difficult to conceive the meaning of the proposition, that, from the act of giving a new bond

in place of a previous one, a promise is implied by law to pay such prior bond. To whom can the promise be supposed to be made? and to what end is it to be implied, when the debtor actually gave an obligation under seal for the same money? It is somewhat suprising, therefore, that the plaintiff should have had a verdict upon any part of the case. But, without notice of that point, the Court holds the instructions and verdict upon the statute of limitations to be unquestionably correct. The contracts of the obligor and the endorser are in their nature several, and no act of the former can change the latter. The act of 1827, indeed, says the endorser shall be liable as surety to the holder; and it is insisted, that the alleged liability of the defendant arises under that provision. But it has been for some time settled, that the sole purpose of that act was to turn the implied conditional contract, between the endorser and holder, into an unconditional one; and that it was not intended to charge the endorser, as if he had executed the bond as co-obligor, or upon an endorsement without consideration, or to deprive him of the benefit of the statute of limitations, by exposing him to stale demands, kept alive, perhaps, by collusion between the obligor and the holder, *Williams* v. *Irwin*, 3 Dev. and Bat. 74. *Ingersoll* v. *Long*, 4 Dev and Bat. 293. The act does not change the mode of declaring against the endorser, except in omitting the former requisites of a demand on the obligor and a notice of the dishonor to the endorser. Indeed, the count, upon which it is sought to recover from the defendant, charges him as endorser merely—that is in assumpsit upon a several and simple contract; and, consequently, the case is within the express provision of the act of 1715.

Per Curiam. Judgment affirmed.

WILLIAM W. TERRY *vs.* JOHN P. VEST, ADM'R, &c.

An administrator is protected by judgments, rendered against him within the nine months allowed him to plead, though in suits after that in which he pleads them.

An administrator, who establishes his plea of fully administered is entitled, of course, under our Statute, to his costs; and the plaintiff, though he take a judgment *quando*, cannot have a judgment against the surety in the administrator's appeal bond, the case having been tried upon appeal.

The cases of *Bryan* v. *Miller*, 10 Ired. 120, *Welborn* v. *Gordon*, 1 Murph. 502 and *Battle* v. *Rorke*, 1 Dev. 228, cited and approved.

Appeal from the Superior Court of Law of Forsyth County, at the Spring Term 1850, His Honor, Judge BATTLE, presiding.

The defendant administered on the estate of the intestate at December term 1848 of the County Court; and on the second of January 1849 the present warrant was brought in debt on a bond of the intestate for $81 13 and returned before a justice of the peace. The defendant appeared before the magistrate and alleged his want of assets to pay any part of the debt, and prayed that the trial should be postponed to some day after the expiration of nine months from the administration taken. But the magistrate refused the postponement, and gave an immediate and absolute judgment for the debt, interest, and costs; and the defendant thereupon appealed to the County Court. Upon the filing of the appeal the defendant moved to quash the judgment on the ground of the magistrate's refusal to postpone the trial. The Court refused the motion, but allowed the defendant time until September term 1849 to plead in respect of the assets. At that

term he accordingly pleaded *plene administravit*, no assets, and prior judgment. After a decision in the County Court, the plaintiff appealed, and on the trial in the Superior Court the defendant offered to prove, that he had applied all the assets to the satisfaction of judgments obtained against him prior to September 1849 in suits brought after January of that year. The plaintiff objected to the evidence, but the Court received it, and the jury found, that the defendant had fully administered. Thereupon the plaintiff signed a judgment *quando*, for the debt; and he also moved for judgment therefor against the surety for the appeal from the judgment of the magistrate. But the Court refused the latter motion, and gave judgment against the plaintiff for the defendant's costs; and thereupon the plaintiff appealed.

Morehead, for the plaintiff.
Iredell, for the defendant.

Ruffin. C. J. The course of the justice of the peace was directly in opposition to the act of 1828, and therefore erroneous. The postponement of the trial of a warrant, brought before the expiration of nine months from the administration, is not in the discretion of the magistrate, but it is made peremptorily his duty; that is, if required by the administrator, for whose benefit the act was passed. But it is not material now to consider that matter, since the administrator had in the County Court the benefit of the delay in pleading until the end of the nine months, and the question is as to the effect of his plea. As to that point the recent case of *Bryan* v. *Miller*, 10 Ired. 129 is decisive, as it establishes as the necessary construction of the statute, that the administrator is protected by judgments rendered against him within the nine months, though in suits after that in which he pleads them.

As the administrator established his plea of *plene administravit*, he was, of course, entitled under the act of 1777 to his costs. *Welbom* v. *Gordon* 1 Murph. 502. That rule is not altered by the statute, which allows a plaintiff, contrary to the common law, to sign judgment *quando* after issue joined on *plene administravit* and found against the plaintiff; as was expressly held in *Battle* v. *Rorke* 1 Dev. 228.

It follows necessarily from those positions, that the plaintiff could not have judgment against the surety for the appeal, for, it is impossible there should be judgment against the surety, when in the same record the judgment is for the principal. If the original judgment had been against the intestate and he had appealed and died, and the cause been revived against the administrator, then the surety would have been liable for the debt formed and the costs; for, supposing that the administrator could therein put the question of assets in issue and it were found for him, such finding would not cover the whole obligation of the surety, who undertook for the ability of the debtor to pay the debt, if any should be adjudged. But when the administrator appeals, the very question may be, and generally is, whether he hath assets; and if that be found for him, it entitles him to judgment, that the plaintiff take nothing by his writ; and that covers the entire undertaking of the surety for his principal, the administrator.

It is considered, therefore, that the decisions were right on each point, and the judgment is affirmed.

PER CURIAM. Judgment affirmed.

JOSIAH BRIDGERS & WIFE *vs.* ISAAC W. HUTCHINS, Adm'r., &c.

An advancement to a husband by his father in law is an advancement to the wife.

The release or cancelling of the bonds of a child, with an intention thereby to prefer him in life, is as much an advancement as so much cash.

Appeal from the Superior Court of Law of Wake County, at the Spring Term 1850, His Honor, Judge MANLY, presiding.

The suit is for an account and distribution of the personal estate of Isaac Hutchins, who died intestate in 1844, leaving four children; of whom the *feme* plaintiff is one. After the administrator's answer, it was referred to the master to state the accounts of the administration, and also to enquire whether the intestate made any advancements to his children respectively and what they were, and upon the basis thereof, if found, to state the share due to the several children, if any.

The report ascertained the surplus in the hands of the administrator, and, after taking into the fund the several advancements made to the children respectively, it found that nothing further was going to the plaintiffs, by reason of an advancement made to the husband, Bridgers, as found by the master upon the examination of Bridgers.—Besides advancements in slaves, and other effects, and cash given, Bridgers stated before the master, that some years before 1842, but after his marriage, he borrowed from the intestate the sum of $250 and $200, and at the several times of borrowing gave his notes therefor to the

intestate: and that in 1842 the intestate gave him up the two notes, to be cancelled, saying, at the same time, that his reason for doing so was, that he, the intestate, did not want them to come against the examinant after his, the intestate's death, and that he was then old and did not expect to live long.

The plaintiffs objected to so much of the report as found those sums of $200 and $250 to be advancements: and upon argument the exception was over-ruled and the petition dismissed with costs, and the plaintiffs appealed.

McRae and *W. H. Haywood*, for the plaintiffs.
G. W. Haywood and *H. W. Miller*, for the defendant.

Ruffin, C. J. The decree must be affirmed with costs. A gift to the husband during coverture is undoubtedly an advancement to the wife: and it is quite clear, that the release of cancelling of the bonds of the child, with the intention thereby to prefer him in life, is as much an advancement as so much cash. *Gilbert* v. *Wetherell*, 2 Simons and Stuart, 254.

Per Curiam. Decree affirmed.

THE STATE *vs.* WILLIAM MOORE.

Turpentine, which has run out of the trees into boxes cut into the tree for the purpose of receiving the liquid, is the subject of larceny.

But to support an indictment for stealing two barrels of turpentine, it must appear that the turpentine was in barrels, when it was stolen, not that it was dipt from the boxes in small quantities, from time to time, and then deposited in barrels.

Appeal from the Superior Court of Law of Beaufort County, at the Fall Term in July 1849, His Honor, Judge MANLY, presiding.

This is an indictment for petit larceny in stealing two barrels of turpentine, of the goods and chattels of Frederick Grist: and on not guilty pleaded there was a special verdict to the effect following: Grist owned a piece of land, on which some pine trees were boxed for making turpentine in the year 1846, and he cultivated them during the months of March and April and a part of May in that year, and he then discontinued the working of them for that season. In August 1846 the prisoner during two days secretly dipped out of the said boxes, made by Grist, as much turpentine in quantity as two barrels, which had run into the boxes after Grist had discontinued the working in May, and he, the prisoner, put the same into two barrels which he had provided and kept concealed in the woods, and he afterwards carried away the said two barrels of turpentine secretly, and sold them for his own gain. Thereupon, the jury say, that they are ignorant, whether the said turpentine was the subject of larceny, and, if it be, whether the said facts sustain the allegation, that the prisoner stole two barrels of turpentine:

and upon those questions they pray the advice of the Court, &c. Upon the verdict judgment was given by the Court for the prisoner, and the solicitor for the State appealed.

Attorney General, for the State.
J. H. Bryan, for the defendant.

RUFFIN, C. J. Upon the first question the Court is of opinion, that the turpentine was the subject of larceny. We learn from a former special verdict, which appears in the record, and from various other sources—including our own observation—that the mode of making turpentine is this: an excavation, commonly called a box, is made in the body of the tree near the ground, into which the turpentine runs from the tree above: and, in order to produce a flow of the gum or to promote it more freely, the tree is occasionally scored above the box with a sharp iron instrument, called a round-shave, and the scoring is done in such a manner as to direct the current of the descending sap into the box: and the turpentine is then collected or dipped out of the box from time to time as it becomes full, during the season of gathering, which ordinarily begins in March and ends in October. The scoring often extends up the body of the tree to the height of ten or fifteen feet, and in its descent a part of the turpentine generally adheres to the tree and becomes hard, while that, which remains liquid, continues its course downwards until it drips in the box, where it remains until collected, and put into casks for use or market. Such being the process in this business, it seems clear, that turpentine, when in the boxes in a state to be dipped up, is personalty. It no longer forms a part of the tree, but it exists separate from the tree, and has been separated by a process of labor and cultivation. If, like the sap of the sugar maple, its flow were directed into a vessel set

on the ground near the tree, no one would doubt its being severed from the realty. Now, this is the same in substance. For the box, though in the tree, is but a more convenient receptacle for the turpentine, after it has been extracted or has been made to exude from the pores, which contained it, while in the tree, as a part of it.—When it ceases to be a part of the tree, it necessarily becomes a chattel.

Upon the other question, however, it is the opinion of the Court, that it is a material part of the description of the turpentine, that when taken it was in barrels. That would not be so, if the term "barrel" imported or could be referred to quantity only; for, one may undoubtedly be convicted, when the evidence shows a larceny of more or less in measure or weight than is charged in the indictment. But a "barrel" of turpentine, or a "barrel" of flour, or a "hogshead" of tobacco, in agricultural and mercantile parlance, as also in the Inspection laws, means *prima facie*, not a certain quantity merely, but, further, a certain state of the article: namely, that it is in a cask. The statute exacts, for example, that every "barrel of turpentine" shall contain thirty-two gallons, and be in good and sufficient casks made of staves of certain dimensions. "A barrel of turpentine" is in a degree a term of art in trade and in the law: and when one says, he has so many barrels of turpentine, he is universally understood to mean that number of casks of the statute size, &c., containing turpentine, and, consequently, that the casks, as well as the turpentine, are his. "A barrel" of turpentine or flour is, thus, one thing, constituted by both the cask and its contents; and it is known so to be by that description. Upon that point, therefore, the judgment was properly given for the prisoner.

Per Curiam. Judgment affirmed.

ETHELDRED J. PEEBLES vs. HEZEKIAH LASSITER.

Under the act of 1840, ch. 37, which gives to the landlord, who has leased to a tenant, the rent to be paid in a part of the crop, a certain interest in the crop raised; if the tenant remains in possession until an execution against him is levied on the whole of the crop, although the landlord may have a special action on the case against the officer levying, yet he cannot maintain an action of trespass, for he has neither the possession nor the property.

Appeal from the Superior Court of Law of Northampton County, at the Spring Term 1850, His Honor, Judge MANLY, presiding.

The action is trespass *de bonis asportatis* for taking 28 barrels of corn belonging to the plaintiff, and was tried on the general issue. The evidence on the part of the plaintiff was, that one Wheeler leased a piece of land from the plaintiff for the year 1848, and agreed to give as rent therefor one-fifth part of all the crops raised on the land that year, or the sum of $25, at the option of the plaintiff. That the plaintiff furnished Wheeler with certain provisions during the year, and it was also argued between them, that they should be returned out of the crop. That Wheeler entered and made crops of sundry articles, and among them a crop of corn, and that, during the autumn, and while Wheeler was gathering the crop of corn, and before the provisions had been returned or any part of the rent had been paid to the plaintiff, and before he had elected whether he would take the rent in money or a share of the crops, the defendant, being a constable, seized 28 barrels of corn under executions issued against the

goods of Wheeler by a justice of the peace, and sold the same. Upon the foregoing evidence the Court was of opinion that the action would not lie, and ordered a nonsuit and the plaintiff appealed.

B. F. Moore, for the plaintiff.
Bragg, for the defendant.

Ruffin, C. J. The right of the plaintiff is supposed in the argument to arise under the Act of 1840, Ch. 37, of which the title is "an act to protect the interests of landlords," and by which it is enacted, that "when any lessee of land shall agree to pay a certain share of his crops or a specific quantity of grain for the rent of land, he shall cultivate under his lease, so much of the crop of the lessee raised on his farm under lease, as will be sufficient to satisfy the rent to his landlord for the year, shall be exempt from execution, and from the lien of all other debts, until the end of each respective year." It is said, that as the purpose of the act is so plainly declared to be the protection of the interests of landlords, it must receive such a construction as will at all events effect that purpose: and that, as it is necessary to that end, that the landlord should have the property in the crops, to the extent of the whole of them, for his satisfaction in the first instance, leaving the surplus to the tenant, the Court will so interpret the statute. But such a rule of construction is altogether inadmissible: for, although it be true, that the legislature intended by the act to secure rents to landlords, yet, upon the mere declaration of such intent in the title, the Court is not at liberty to apply any and all means, that may be necessary or useful to such security, but is restricted to such means as the statute may provide, and to the extent therein prescribed, advancing the remedy, however, as far as a liberal interpretation of the language will allow. Now, in the present instance, it is

impossible to invest the landlord with the whole property in the crops, since that would be in direct opposition to the express words of the act: which, are that "so much" (only) "of the crop, as will be sufficient to satisfy the rent for the year, shall be exempt from execution." The whole crop, therefore, cannot belong to the landlord: and it must be admitted, we think, that unless he has the whole, he has not the property in any part—since there is nothing in the act to make him the owner of one part more than another, but he is only the creditor of the lessee for so much rent. In order to secure the payment of the rent, the crop is *pro tanto* exempted from execution against the tenant. Still, the property remains in the lessee, and it would seem that, by reason thereof, the lessee might have an action against the sheriff for seizing that part of the crop. Perhaps, also, the landlord may have an action grounded on the statute against the officer or creditor for doing execution on the tenant's crops on the land, without leaving sufficient to pay the rent reserved in kind. Something like that was, probably, thought of by the writer of the act: and it is possible the words might be stretched that far and the remedy given as under an act in England in *pari materia;* namely, St. 8 Ann. C. 14, for the better security of rents and to prevent frauds by tenants. That statute has, however, several material provisions, which are not in ours, and which show that the security of the rent was alone in the purview of the act, and that it was meant, the landlord and no other should have the action for taking the goods in execution. The one is, that, before the removal of the goods by the officer, the creditor shall pay the landlord the rent due on the premises at the time, not exceeding that for one year: and the other is, that if the tenant fraudently remove his goods from the premises, the landlord may, nevertheless, distrain them elsewhere within a fixed period. Upon that act a special action on the case

has been framed for the landlord against the sheriff for taking the goods without paying the year's rent, upon notice that it was due and in arrear. Possibly an action may likewise arise to the landlord upon the act of 1840 for doing execution without leaving his share of the crop. But, if so, it must be a like special action on the case on the statute, upon the general principle laid down by Lord Coke, 10 Rep. 75, that, when a statute prohibits anything, the party grieved shall have an action upon the statute, although it be not given by the words of the statute.—The difficulty is in holding, under the imperfect provisions of the act of 1840, that the landlord is a person grieved, since it does not charge the officer or the creditor with any duty to him, nor vest in him a property in any part of the crop or lien on it, but leaves the whole at the absolute disposition of the tenant. Whether, however, such an action will lie on this act in any case, or, if so, whether it would lie when the rent is not to be paid exclusively in the specific crops, but in them, or in money, are questions upon which farther consideration would be bestowed, if the decision of the case turned on them. But it does not: for this is an action of trespass, and is founded on possession in the plaintiff, and here he had neither the property nor the possession, but both were in the lessee at the time of the taking; and therefore the action will not lie.

Per Curiam. Judgment affirmed.

F. & S. WARING vs. DANIEL RICHARDSON.

Where money has been received by an agent, a demand or a misapplication of the money is necessary before an action can be brought, and the Statute of Limitations only begins to run from the time of such demand.

The cases of *Potter* v. *Sturges*, 1 Dev. 79, *White* v. *Miller*, 3 Dev. & Bat. 55, and *State* v. *Sugg*, 3 Ire. 96, cited and approved.

Appeal from the Superior Court of Law of Pasquotank County, at the Spring Term 1850, his Honor Judge ELLIS presiding.

This was an action of assumpsit, brought to recover the sum of $61 19, with interest on the same from the 15th of March, 1842. The plaintiffs proved by their agent that on the 15th of March 1842, the defendant received from them a note to collect as their agent: that the note was the property of the plaintiffs and was originally drawn payable to one.

For the purpose of repelling the plea of the statute of limitations and showing the collection of the note by the defendant, the plaintiffs called a witness, who swore, that, as the attorney of the plaintiffs, he called on the defendant several times within three years before the beginning of this suit, and, in the name of the plaintiffs, demanded payment of the money: that the defendant said he had collected the *money*. This witness also stated, that the defendant raised no objection to paying said money, and never pretended that he had ever paid, previous to that time, until the last time he called upon him, when he pretended that the plaintiffs had collected the amount of this claim from another person, against whom he had brought

a suit. He did not say in this conversation, that he had paid the money himself, but that he was a surety with others of the persons sued, and that the said sureties paid the said claim. The witness said, that this allegation of payment was made only in the last conversation they had on the subject, and that the said claim had not been collected in the said suit. The Court charged the jury, that, if they believed the witness, the plaintiffs were entitled to recover: that the words used by the defendant, when taken in connexion with the other evidence, was an acknowledgment of an existing debt, from which the law would imply a promise. The jury returned a verdict for the plaintiffs. Defendant moved for a rule for a new trial. Rule granted and discharged. Judgment of the Court was rendered, from which defendant prayed an appeal to the Supreme Court, which was granted.

Heath, for the plaintiffs.
W. N. H. Smith, for the defendant.

Nash J. It is deemed unnecessary to decide the question, upon which the opinion of the Judge below was given. From the statements of the case, the point did not arise. The plaintiffs had put into the hands of the defendant, for collection, a promissory note, and the action is brought for collecting the money and not paying it over. Among other defences the defendant relied upon the Statute of Limitations. The complaint is not for a breach of duty in collecting, not for undertaking and entering upon an agency, for a compensation, and then either failing to perform it, or performing it so negligently that an injury was sustained by the plaintiffs; but for the money, secured by the note, which the plaintiffs allege the defendant had received. The plea of the Statute of Limitations assumes or admits, that the money had been received by the defendant, but when it is accompanied

by the general issue, as in this case, it does not exempt the plaintiffs from the obligation to prove it. Accordingly the plaintiffs did not rely upon this assumption, but gave in evidence the admission of the defendant that he had received it. This admission was made within three years next before the bringing of the action, and when, for the first time, as far as the case discloses, the money was demanded of him. The defendant was a collecting agent of the plaintiffs to receive the money. His reception then was a rightful one; and to give the plaintiffs a right of action for its detention, a demand or evidence of the misapplication of the money was necessary, *Potter* v. *Sturges*, 1 Dev. 79; *White* v. *Miller*, 3 Dev. & Bat. 55; *State* v. *Sugg*, 3 Ire. 96; and from the time of the demand the statute began to run. Strike out the admission of the defendant and the demand then made, and there was no evidence in the case that the money ever had been received by him or of any demand upon him. And according to that admission the money might have been received by him the day before. The length of time in which the claim for collection has been in the hands of an agent may, under circumstances, be evidence both of the collection of the money and its use by him. But the case does not state the length of time the note put into the hands of the defendant had to run, or whether it was then at maturity. We are merely informed that the money had been received by him and that within three years before the bringing of the action, at which time also the demand was made. The statute never was set in motion, according to the case, until the time mentioned in the statute.

PER CURIAM. Judgment affirmed.

ANDREW J. BARWICK vs. JOSHUA BARWICK & AL.

In an action of trover, except for a mere temporary conversion, the plaintiff recovers the value of the property recovered, and, therefore, to entitle him to recover, he must show title and a possession, or a present right of possession.

The cases of *Hostler* v. *Scull*, 2 Hay. 139, Tay. 153; *Laspere* v. *McFarland*, N. C. T. Rep 187, and *Andrews* v. *Shaw*, 4 Dev. 70, cited and approved.

Appeal from the Superior Court of Law of Wayne County, at the Spring Term 1850, His Honor, Judge BAILEY, presiding.

J. H. Bryan and *Mordecai*, for the plaintiff.

No counsel for the defendants.

PEARSON, J. Benjamin Sutton, by his will, gave a number of slaves to his wife, Sarah Sutton, for her life: and at her death to be divided among his four daughters, one of whom was Winifred, the wife of Joshua Barwick, one of the defendants. Joshua Barwick and his wife sold their interest in said slaves to the plaintiff, who took four of them into his possession. Afterwards, the said Joshua sold the two slaves sued for to Wood, who, with the assistance of the other defendant, Brown, took them from the possession of the plaintiff, and sent them out of the State; whereupon this action of trover was brought.

The case made up by his Honor, states that it was not proven that Sarah Sutton was dead. The plaintiff insisted that he was entitled to recover on two grounds; 1st. because he had the title; and 2nd., because he had the possession, and could recover against wrong doers.

His Honor charged, that the plaintiff could not recover on the first ground, because it was not proved that Sarah Sutton was dead; but he charged, on the second ground, that, if the plaintiff was in possession of the slaves, and the defendants took them, and sent them out of the country, he was entitled to recover their value, with interest from the time of the conversion: as the defendants were wrong doers and had shown no title. There was a verdict for the plaintiff, and, from the judgment thereon, the defendants appealed.

The defendants excepted to the charge of his Honor, upon the second ground, and we think the exception well founded.

The bare possession is sufficient to maintain an action of trespass against a wrong doer, for the gist of that action is an injury to the *possession*, and the measure of damage is not the value of the property, but the injury done to the plaintiff by having his possession disturbed.

In trover, the injury done by the *wrongful taking* is waived, and the plaintiff supposes he has lost the property: and alleges that the defendant found it and wrongfully converted it to his own use. So the gist of the action is not, that the defendant, having found the property, took it into his possession, but that, after doing so, he wrongfully converted it to his own use, and the measure of damage is the value of the property.

It is true, that when nothing appears, but the fact that the defendant took the property out of the possession of the plaintiff and converted it to his own use, trover will lie. For the possession of personal property is *prima facie evidence* of title, and in the absence of any proof to rebut this presumption, the person in possession is taken to be the owner and can recover the full value. But, if it appears on the trial, that the plaintiff, although in possession, is not in fact the owner, and that the property belongs to a third person, the presumption of title, in-

ferred from the possession, is rebutted: and it would be manifestly wrong to allow the plaintiff to recover the value of the property. For the real owner may forthwith bring trover against the defendant, and force *him* to pay the value a second time, and the fact that he had paid it in a former suit would be no defence. When trover is brought and the defendant satisfies the judgment, he pays the value of the property, and the title is vested in him by a *judicial* transfer, because he has paid the *price*. Consequently, trover can never be maintained, unless a satisfaction of the judgment will have the effect of vesting a good title in the defendant, except when the property is restored, and the conversion was temporary. Accordingly, it is well settled as the law of this State, that to maintain trover, the plaintiff must show title and a possession, or a present right of possession. *Hostler's administrators* v. *Scull*, 2 Haywood 130, Taylor 152, *Laspeyre* v. *McFarland*, N. C. T. R. 187, *Andrews* v. *Shaw*, 4 Dev. 70.

There are cases in the English books, and in the reports of some of our sister states to the contrary; but we must be allowed to say, that the doctrine of our Courts is fully sustained, by the reason of the thing, and is most consonant with the peculiar principles of this action. The cases differing from our decision, are all based upon a misapprehension of the principle laid down in the leading case, *Delimere* v. *Armory*. In that case the jewel was lost, and was found by the plaintiff, a chimney sweeper. He had a right to take it into possession, and became the owner, by the title of occupancy, except in the event of the true owner becoming known. The former owner of the jewel was not known, and it was properly decided that the finder might maintain trover against the defendant, to whom he had handed it for inspection, and who refused to restore it.

But the result of that case would have been very different, if the owner had been known. The defendant could then have said to the plaintiff, you have no right to make me pay you the value, when I must forthwith deliver up the property to the owner, or else pay him the value a second time.

The distinction between that case, when the possessor was the only known owner, and the ordinary case of one, who himself has the possession wrongfully and sues another wrong doer for interfering with his possession, the true owner being known and standing by, ready to sue for the property, is as clear as day-light.

In this case, for instance, as the facts appeared on the trial, the plaintiff was in the wrongful possession, which was disturbed by the defendant, and for that injury he had a right to recover in trespass. But Sarah Sutton was known as the true owner, and had a right to demand her property of the defendants, or else to recover its value, and they could not protect themselves by showing that they had paid the full value to the plaintiff, under the coercion of a judgment and execution. This result would seem, by the *reductio ad absurdum*, to show that the inference from the case of *Delimere* v. *Armory*, that trover can be maintained against a wrong doer by one not having a naked possession, when the true owner is known, is contrary to good sense. That which is not good sense, is not good law.

The judgment must be reversed and there must be a *venire de novo*.

Per Curiam. Judgment reversed and *venire de novo*.

RICHARD FELTON vs. SAMUEL SIMPSON.

In order to raise the presumption of the grant of an easement, two things are necessary: there must be a thing capable of being granted, and there must be an adverse possession or assertion of right, so as to expose the party to an action, unless he had a grant.

Appeal from the Superior Court of Law of Perquimans County, at the Spring Term 1850, his Honor Judge Ellis presiding.

A. Moore, for the plaintiff.

Heath and *Jordan*, for the defendant.

Pearson, J. This was a case for an injury to land and a crop of corn. The plaintiff has owned and been in the possession of the land, ever since the year 1822. Before that time, a dam was constructed on the land of one Welch, which was situated above and adjoined the land of the plaintiff. The effect of the dam was to protect the land of the plaintiff from sudden inundations in heavy falls of rain, by ponding the water, until it could be drained off by ditches leading from the pond through the plaintiff's land to a swamp below. The plaintiff had been in the uninterrupted enjoyment of the benefit of this protection of his land from the year 1822 up to 1848, when the defendant cut through the dam, and a large body of water, then collected from recent falls of rain, passed through on the plaintiff's land, overflowed his ditches, flooded his land and injured his crop of corn. For this injury to his land and corn, the action is brought. The case does not state, by whom the dam was constructed, or for what purpose.

The Court instructed the jury, that, if the plaintiff had been in the uninterrupted enjoyment of the benefit of this protection afforded by the dam and the ditches to his land, for more than twenty years, he had acquired such a right or easement, in the dam, as to entitle him to recover. To this the defendant excepts.

The exception is well founded: for the doctrine of the presumption of grants to easements from long possession, has no application to this case.

When one continues in the uninterrupted possession of land for thirty years or enjoys the use of a franchise for twenty years, a grant is presumed. So, if one erects a dam and ponds back water upon the land of another, and is allowed to keep it there, for twenty years, a grant of the easement or privilege of doing so is presumed; and so in many similar cases. But to make this doctrine applicable, two things are necessary. There must be a thing capable of being granted: and there must be an adverse possession or assertion of right: so as to expose the party to an action, unless he had a grant; for, it is the fact of his being thus exposed to an action and the neglect of the opposite party to bring suit, that is seized upon, as the ground for presuming a grant, in favor of long possession and enjoyment, upon the idea that this adverse state of things would not have been submitted to, if there had not been a grant.

Where one erects a dam on his own land, and another, who owns land below, incidentally derives a benefit, by availing himself of the protection, which the dam enables him, by means of ditches, to give to his land, which is our case, neither of these essentials for presuming a grant has an existence.

There is nothing capable of being granted; for the one has a right to cut ditches and to protect his land, and therefore cannot acquire such right by a grant, for he has it

already, and the other cannot grant it, for he has not got it to give.

There is no adverse possession or assertion of right, so as to expose the party to an action. The owner of the dam can make no objection; his rights are not interfered with; and the owner of the land below can acquire no new right by simply doing what every body admits he has a perfect right to do, and what no body has any right to oppose.

We think his Honor erred, in holding that the plaintiff had by his long enjoyment acquired an easement or right to have the dam kept up, which is the ground upon which the case was put, in reference to which the damage was found and to which the defendant excepted. We do not feel called upon to decide any other point.

Per Curiam. Judgment reversed and *venire de novo*.

JOSEPH AREY vs. DAVID STEPHENSON.

A promise of a party that he will settle with another will only take a claim out of the Statute of Limitations, when it clearly appears that the promise referred to that particular claim.

The cases of *Smith* v. *Leeper*, 10 Ire. 86, *Peebles* v. *Mason*, 2 Dev. 367, and *Smallwood* v. *Smallwood*, 2 Dev. & Bat. 330, cited and approved.

Appeal from the Superior Court of Law of Cumberland County, at a Special Term in February 1850, his Honor Judge Ellis presiding.

The action is assumpsit for money paid for the defendant, and was brought in October 1839. Pleas, non-as-

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sumpsit, and statute of limitations. The plaintiff proved, that in 1830 he paid to one Murphy the sum of $70 for the defendant: and he further examined one Jennings, as a witness, who stated that, shortly after this suit was brought, he was in Mobile, in Alabama, (where the defendant then resided,) and received a letter from the plaintiff, written from Fayetteville, in this State, which he showed to the defendant, who read it and flew into a passion and said, "I will not settle with you: but I am going to Fayetteville shortly, and will settle with Mr. Arey himself." The witness did not produce the letter, and was unable to state its contents; but he said further, that the defendant and he had other talk at the time, and he thought the Murphy claim was mentioned in their conversation.

The Court instructed the jury, that the action was barred, unless it was taken out of the Statute of Limitations by the testimony of Jennings; but that, if they believed the words spoken by the defendant to Jennings referred to the claim in suit, they amounted to an acknowledgment of it as a subsisting debt, and the Statute would not bar. The jury found for the plaintiff, and the defendant appealed from the judgment.

W. Winslow, for the plaintiff.

Strange, for the defendant.

Ruffin, C. J. The Court would concur in the opinion given to the jury, if the contents of the letter, to which the defendant referred, sufficiently appeared, so as to enable us to see, that the defendant intended to promise to settle this claim. The case would then be similar to that of *Smith* v. *Leeper*, 10 Ire. 86, in which the promise was to settle an account that had been before stated and was then shown to the defendant. That circumstance defined and limited the language of the party, so as to make it

applicable to a certain debt, then in the contemplation of the person, and to that only, as in all fairness and justice it should be. It was, in terms, to settle the particular debt appearing upon the account before the parties. But it is entirely otherwise in the present case. Nothing appears here, except that a letter from the plaintiff to the witness was shown to the defendant, and the defendant, after reading it, said, he would settle with the defendant. Settle what? Why, it could only be the matter mentioned in that letter. What was that? We are uninformed.—It is but a bare conjecture, that it may have related to this demand; and that is too vague to authorize an inference, that the promise was in fact to pay this very debt. It is impossible to understand the language used by the defendant without some colloquium: for, "I will settle with Mr. Arey" is in itself senseless. That is not furnished here, for the want of a knowledge of the subject of the letter. The subsequent part of the testimony of the witness is equally unsatisfactory. He could not remember certainly, that "the Murphy claim," as he calls it, was mentioned in the conversation, though he thought it was; but he does not tell us what was understood by that description, nor does he say what was said in relation to it, much less that the defendant agreed to settle that claim. Such loose language is unfit to go to a jury as evidence of a promise to pay a debt, for which the party was not before bound. It would virtually take away the protection, which the Legislature meant to give against stale demands. The present case seems clearly to fall within the rule laid down in the previous ones of *Peebles* v. *Mason*, 2 Dev. 367, and *Smallwood* v. *Smallwood*, 2 Dev. & Bat. 330.

Per Curiam. Judgment reversed and a *venire de novo*.

DEN ON DEMISE OF BENJAMIN HARRIS *vs.* NANCY Y. DeGRAFFENREID.

Under our act of Assembly a man cannot be held to be a purchaser for a valuable consideration, who gives for the land not more than one half or two thirds of the value.

Although one of the debts inserted in a deed of trust to secure several creditors be fraudulent, yet the legal title passes to him and his sale to a third person is valid.

The case of *Brannock* v. *Brannock*, 10 Ired. 428, cited and approved.

Appeal from the Superior Court of Law of Chatham County, at the Spring Term 1850, His Honor, Judge BATTLE, presiding.

Joseph J. Rives was seised of a tract of land, containing about 170 acres, and, on the 6th day of December 1847, he conveyed it by a deed of trust to Samuel H. Crutchfield, to secure certain sums of money therein mentioned, as due from Rives to sundry persons. The deed recited that Rives was indebted to James Perry in the sum of $302 85, due upon three bonds dated December 3rd, 1847: also to John McPherson in the sum of $44 13 upon a bond given May 28th, 1847: also to Marsh & Co. in the sum of $38 and interest, on a judgment rendered by a Justice of the Peace: and to Robert Love in the sum of $16, on a judgment of a Justice of the Peace: and that he was desirous to secure the payment of those debts. The deed then purports, in consideration of the premises and of the sum of one dollar paid to Rives by Crutchfield, to convey the land

in full to Crutchfield, upon trust, that, if the several debts should not be paid and satisfied on or before the 1st day of January 1848, the trustee should sell the premises at auction to the highest bidder for ready money, and out of the proceeds pay the debts or such sums as might then be due thereon. The deed was executed by Rives and Crutchfield, and was proved on the 6th and registered on the 7th of December, 1847.

On the 13th of December 1847, Rives sold and conveyed to Harris, the lessor of the plaintiff, one hundred acres of land, parcel of the above tract, at the price of $200, which Harris then paid. Evidence was given that the same was worth at the time from $300 to $400.

On the 31st of January 1848, Crutchfield, in pursuance of the terms of the deed, exposed the whole tract of land for sale to the highest bidder, and the defendant became the purchaser at the price of $480 50, then paid down, and took a deed from the trustee. Evidence was given that the value thereof was $500 or $600.

The plaintiff alleged that the deed of trust was made with the fraudulent intent to delay and hinder the creditors of Rives, and was therefore void as against the creditors and the lessor of the plaintiff. In support thereof the plaintiff examined the said Rives as a witness: and he deposed, that a large portion of the debt to Perry, mentioned in the deed, was not owing by him and was inserted by an arrangement between him and Perry, with a view to save his land or a part of it for the benefit of his family: that the other debts, mentioned in the deed, were just, and that Crutchfield, the trustee, was not aware of the fraudulent arrangement between the witness and Perry, and was told by them that everything was fair. The plaintiff gave further evidence, that just before the sale by the trustee, a person stated to the defendant, that the plaintiff had purchased a part

of the land, but that he did not think he intended to claim it.

The counsel for the plaintiff thereupon moved the Court to instruct the jury, that the deed of trust was fraudulent and void, and that, if the jury believed the witness, the defendant had, at the time of the purchase from the trustee, such notice of the claim of the lessor of the plaintiff, as prevented the defendant from acquiring the title by the sale and deed from the trustee.—But the Court refused the instruction as prayed for; and told the jury, that, supposing the deed of trust to have been executed with the fraudulent intent imputed to it, yet, if the defendant purchased for a fair price and without notice of such fraudulent intent, the title was good; and that there was no evidence, that the defendant had notice of the alleged fraudulent intent in the execution of the deed. The jury found for the defendant, and after judgment the plaintiff appealed.

Haughton and *W. H. Haywood*, for the plaintiff.
No counsel for the defendant.

RUFFIN, C. J. There seems to have been a singular confusion of matters, entirely distinct in their nature, in the mode of stating the propositions on the part of the plaintiff, at the trial. Although the lessor of the plaintiff was not a creditor, and did not claim under a creditor, of Rives, but was a purchaser from that person after he had made the deed of trust, yet it was insisted for the plaintiff, that the deed of trust was fraudulent and void against the creditors of the maker, and therefor, was void also as to the lessor of the plaintiff. Now, in the first instance, it does not appear, that the deed of trust could have been void as against creditors: since there were no creditors, as far as we see, but those secured in the deed, and, as to them, no fraud can be inferred, as the fund was

ample to pay them all and produced enough for that purpose, even according to the sums set forth in the deed. In the next place, it does not follow that the deed of trust would be void as against Harris, although it might have been fraudulent as to certain creditors of Rives: for, although the same facts, which make a deed fraudulent under the 13th Eliz. as to creditors, may, generally speaking, render it fraudulent also under the 27th Eliz. as against a purchaser, yet it is clear, that a deed is not fraudulent as against a purchaser, merely because it was so as against creditors. Since our act of 1840, c. 28, that is so beyond all doubt; for by that act, no person can be held to be a purchaser except he purchase for full value, and without notice of the prior conveyance, which he impeaches as fraudulent. The distinction is very material; and its existence probably accounts for the effort on the part of the plaintiff to put his lessor's claim upon the merits of supposed creditors of his vendor and not upon his own merits as a purchaser: since, however this might have been deemed a purchase at a fair price, according to the old law, *Fullenwider* v. *Roberts*, 4 Dev. and Bat. 488, it is certain that under our late act, one cannot be held to be "a purchaser for the full value, who gave not more than one half or two-thirds of the value. His Honor was, therefore, not only right in not giving the directions prayed on the part of the plaintiff, but might properly have told the jury, that the deed of trust was not void as against the lessor of the plaintiff, upon the ground that it was made with an intent to defeat creditors of the maker or purchasers from him, inasmuch as the plaintiff did not bring his lessor within either of those classes of persons; and therefore the deed of trust was good as against him as much as against Rives himself. That consideration alone would have put an end to the title under which the plaintiff claims, and required the verdict to be rendered for the defendant.

But the Court holds, that the defendant was entitled to a verdict upon the other ground, that the legal title vested in the trustee, in virtue of the separate trusts in favor of the several real creditors secured in the deed, according to the principle laid down in the recent case of *Brannock* v. *Brannock*, 10 Ired. 428; there being no imputation of collusion between them or the trustee and the other parties, Rives and Perry. That case shows that, whatever relief Harris might have in another forum, out of the fund applicable to the debt of Perry under the deed, by reason of the fraud and illegality of the trust for that debt, yet the title of the trustee was not thereby avoided at law. Consequently, the conveyance of the trustee to the defendant must likewise be effectual at law. Of course, the defendant's purchase could not be affected by notice of the claim of Harris, if there had been the most direct and sufficient evidence of notice: inasmuch as the title of Harris was intrinsically defective, being posterior to the deed of trust and not for full value, and consequently, notice of it could not impart to it new validity.

PER CURIAM. Judgment affirmed.

HENRY H. SMALL *vs* HARMAN EASON.

An overseer of a public road has no right, at his discretion, to widen the road. This can only be done by a jury under the direction of the County Court.

Appeal from the Superior Court of Law of Beaufort County, at a Special Term in January 1840, his Honor Judge BATTLE presiding.

The plaintiff was the overseer of "a public road leading from Singleton's to the town of Washington," in Beaufort County, and this is a warrant by him for the penalty given by the 10th Section of the Revised Statutes, Ch. 104, for neglecting to send a hand to work on the road. On the trial in the Superior Court, on *nil debet* pleaded, the case was this: The defendant carried his hands to the road at the time appointed, and found the plaintiff engaged in cutting and grubbing bushes on each side of the road, so as to widen it from twenty to thirty or thirty-five feet. He then enquired of the plaintiff, whether he intended to make the road that width all the way to Washington, and the plaintiff told him, he did. Thereupon the defendant stated to the plaintiff, that he was willing his hands should remain and work on the road to the width of twenty feet, but that they should not work outside thereof, to the greater width of thirty, or thirty-five feet. For that refusal and failure this suit was brought.

The counsel for the defendant insisted, that the plaintiff had no right to require the hands to clear the land or

do work to a greater width than the road then was, for the purpose of widening it to the extent mentioned: and therefore that the defendant did not become liable to the penalty by refusing to work for that purpose. But the Court instructed the jury, that the overseer had a discretionary power to make the road of greater width than twenty feet, when he deemed it necessary: and therefore that the plaintiff had the right to widen his road to the dimensions mentioned, and was, consequently, entitled to recover. From a verdict and judgment against him the defendant appealed.

No counsel for the plaintiff.

Biggs, for the defendant.

Ruffin, C. J. In the 14th section of the Statute concerning roads it is enacted, that "all roads laid off under the provisions of the Act, shall be deemed public roads, and shall be at the least twenty feet wide"—with other provisions, that where the overseer may deem it expedient to make causeways, they shall be at least fourteen feet wide, and the earth be taken equally from each side to cover them, and that the overseers shall have all stumps and runners cut and completely cleared for the width of sixteen feet in the centre of the highways. The enactment, therefore, is positive, that roads must be laid out so as to be twenty feet wide; and from the terms "at the least," it follows, that the width of the road may be more or less, and that twenty feet is to be the minimum. A provision for roads of greater dimensions than the minimum mentioned is most reasonable, as the great highways of the country and those near large towns ought to be of more spacious dimensions than such as are less used. The question, however, on which the case turns, is, by whom and in what manner the width of a road is to be determined?

There seems to be strong and decisive objections to leaving it to the discretion of the overseer. What is the public road ought not to be varying and uncertain, but determinately fixed in some authentic manner. That is requisite, as well in order to ascertain the quantity of land which the public appropriates to its use, and the measure of compensation to the proprietors, as to determine the powers and duties of the overseer and the hands. An overseer, for example, is liable to indictment for suffering any part of his road to be out of repair. But, when a road has been laid off by a jury twenty feet wide and opened accordingly, it could not be maintained that, because an overseer should clear ten feet on each side, he thereby legally took the additional land from the owner and converted it into highway and subjected himself and his successors to prosecution for not keeping the addition, as well as the original road itself, in repair. And it would seem clear, that the overseer could not compel his hands to work on any place, unless he could be indicted for not clearing or repairing the same place, as a part of the public highway. Besides, a discretion to enlarge from time to time involves also a like discretion to diminish the dimensions of the road: and the latter clearly could not be tolerated, since it would put it in the power of the overseer to contract a road, though it lead to a great market town and had been laid off thirty or forty feet wide, as required by the public convenience. It is plain, therefore, that it would not be fit to invest overseers of the roads with a discretion so arbitrary and fluctuating, and one which might practically produce so many mischiefs. Accordingly, upon recurring to the statute on this subject, it is found that it does not vest such a discretion in the overseer, and that its provisions require the track of the road, necessarily including its dimensions, to be judicially established. The first and second sections give power to the County Court to order the laying

out of public roads, where necessary; and the fourth section enacts, that "all roads, to be hereafter laid out, shall be laid out by a jury of freeholders—which laying out, and such damage as private persons may sustain, shall be done and ascertained by the jury on oath." The terms, "lay out the road" and "lay off the road," import that the jury should not only fix the course of the road, as passing particular points, but also designate it, after the manner of a survey, by its lines: in other words, lay down the whole ground covered by the road, or specify its width.—For, when it is said, that every road shall be laid out by a jury, and shall be so laid out as to be at the least twenty feet wide, it is made the duty of the jury, upon their own judgment or under the order of the Court, to lay it out of that or such greater width as to the Court or jury may seem fit. The inquisition, being returned and sanctioned by the Court, concludes the overseer and hands, as it does the rest of the community. It is supposed not to be common for the jury to specify the width of the road, so that it can be seen on the face of the report; and the usual course is to stake or otherwise designate the ground by marks, and refer to them in the report, so as to enable the overseer to identify the intended track of the road and open it accordingly. The appropriation of that line of road, by opening and using it as such, would subsequently sufficiently establish it to be the true line, as laid out by the jury, and constitute the public road. But if the inquisition should omit the width it would not follow that it was void; but the road would be established, as ordered by the Court and reported by the jury, and be deemed of the width of twenty feet along the prescribed line, since it must, by law, be of that width at all events, and there is no other limit in particular, to which it can be carried. The proceedings, by which this road was laid out, were not given in evidence, and probably were not necessary. The exception states it as a fact, that it

was a public road. It is taken, therefore, to have been duly laid off by a jury, and, upon the grounds mentioned, to have been laid off twenty feet wide. Indeed, it is apparent, from the statement of the facts and the form of the prayer for the instructions, that, probably for a long time and up to the period of this controversy, it had been used and worked on as a road of that width. To that extent the defendant was bound and willing to work in repairing it; but the overseer did not wish that, and insisted on employing him in extending the road from its original width of twenty feet to thirty-five feet. That he had no right to do: and, as the defendant was only bound to work the public road, he incurred no penalty by refusing to work on what was not a part of the road. It may be said, that the public convenience may require that a road, though sufficient for public uses when laid off, should be made wider than twenty feet; which is certainly true. But, when a necessity of that kind arises, application must be made to the Court and a jury ordered to lay it off again, of the requisite dimensions. An overseer ought not to be allowed of his own head to encroach on private right, or to diminish his own responsibilities, by enlarging or lessening a public highway, as legally established.

Per Curiam. Judgment reversed and *venire de novo*.

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HARRY NICHOLS *vs.* RICHARD P. FREEMAN.

A vendee, by contract for the sale of a tract of land, can maintain an action upon the bond for title, without having made a payment or tender of the whole of the purchase money, when, by a sale of the property, it is put out of the power of the vendor to make the conveyance, at the time the vendee has a right to call for it.

And it makes no difference, whether the vendor himself has made the conveyance, or whether it has been made by a sheriff under process of law.

In such a case, the measure of damage is the difference between the real value of the property at the time of the breach, and the amount of the purchase money, remaining unpaid.

Appeal from the Superior Court of Law of Bertie County, at the Fall Term 1849, his Honor, Judge MANLY, presiding.

Smith and *A. Moore*, for the plaintiff.
Bragg, for the defendant.

PEARSON, J. On the 1st day of January 1841, the plaintiff purchased of one Sutton "the town lot, house, and furniture" in the town of Windsor, at the price of $8000, and to secure the payment thereof, executed three notes for $2666 each, falling due on the 1st of January 1842, '3, '4, and drawing interest from date, and on that day was let into possession. At the same time, Sutton, with the defendant as his surety, executed to the plaintiff a penal bond in the sum of $10,000. The condition, after reciting the contract, the execution of notes for the purchase money, and that the plaintiff was let into possession, but that the title was to be held by Sutton, as a further security for the purchase money, is in these words:

"Now, if the said Nicholls, or any other person for him, shall well and truly pay the purchase money, and the said Sutton thereafter, upon being requested, shall refuse to execute a good and sufficient deed, with covenants of seizin and warranty, to the said Nicholls, his heirs and assignees, for the above mentioned property, then the obligation to be in full force, otherwise to be void."

The action was commenced in March 1848, and is for a breach of this bond. The breach assigned is, that on the 8th of May 1843, the lot, house, and furniture were sold by the sheriff, under executions against Sutton, issuing upon sundry judgments, rendered against him, at August term 1842, of the County Court of Bertie; by reason of which sale, the said Sutton was disabled, and so continued until his death, and his heirs and administrator have ever since been disabled and incapable to convey the property, according to the true intent and meaning of the bond. The declaration has several counts, setting out the breach in different ways.

It was admitted, that the sheriff sold the property and made a deed to the purchaser, who evicted the plaintiff in March 1845. In January and February 1841, the plaintiff made payments amounting to $6552 78. Sutton died in December 1843, intestate and insolvent, leaving several infants his heirs. The value of the property at the time of the sale by the sheriff was $2500. It was also admitted, that the plaintiff had not tendered to pay the balance of the purchase money; and in August 1841, he conveyed his interest in the lot, house, and furniture, in trust, to secure certain of his creditors, whose debts still remain unpaid.

And it was agreed, that if his Honor was of opinion, that the action could not be maintained, a non-suit should be entered; otherwise, judgment to be entered for the penalty of the bond, to be discharged by the payment of $8060 25, if his Honor should be of the opinion, that the

proper measure of damage was the amount which had been paid by the plaintiff, less the rent of the property, while the plaintiff was in possession, (from January 1st 1841 to 8th of May 1843, the date of the Sheriff's sale;) or of the sum of $207 80, with interest from the 8th of May 1843, if his Honor was of opinion, that the proper measure of damage was the difference between the value of the property at the time of the Sheriff's sale and the balance of the purchase money remaining unpaid with interest; or of six pence, if his Honor was of opinion, that the plaintiff was only entitled to nominal damage.

His Honor was of opinion, that the action could not be maintained. A non suit was entered, and the plaintiff appealed.

Two questions are presented. Can a vendee, without making a tender of the balance of the purchase money, maintain an action upon a bond for title, on the ground, that by a sale of the property, it is put out of the power of the vendor to make the conveyance, at the time the vendee has a right to call for it?

Lovelock v. *Franklin*, 55 C. L. R. 372; *Bondel* v. *Parsons*, 10 Each. 359; *Coke on Littleton*, 221, and the other authorities cited by the plaintiff's counsel, fully support the position for which he contends. In *Lovelock* v. *Franklin*, the defendant had put the plaintiff in possession of the house, at an annual rent, and had agreed to convey the absolute interest to him, at any time within seven years, on payment by him, at any time during the seven years, of the sum of $1406. The defendant, during the seven years, sold and conveyed the premises to a third person, and the action was brought before the expiration of the seven years and without a tender of the $1406.—The Court held, that the defendant had broken his contract by making the conveyance, and that the action could be maintained without a tender; for, as the defendant had put it out of his power to make the conveyance,

a performance on the part of the plaintiff was dispensed with, and it would have been a "vain and foolish" thing to make the tender.

In that case, the action was brought before the expiration of the seven years; and it was urged, that there was no breach, for the defendant might recapacitate himself to make the conveyance, by purchasing back the property, before the time ran out; but the Court held, that there was a breach, for the defendant had incapacitated himself at the very time, when he might be called on and should be ready.

In this case, from the terms of the bond, we think that the plaintiff was at liberty to pay the money at any time and call for a title before his last note became due; for the credit was given for his benefit, and he might waive it, and pay sooner and stop interest: and the defendant was to convey upon the payment of the purchase money, for which purpose, alone, the title was retained. This action was not brought until the last note fell due: and admitting that the defendant might have recapacitated himself by a repurchase before that time, it is sufficient to say, he failed to do so, and was incapacitated at a time when he "might be called on and should be ready."

The defendant's counsel, admitting the general principle, insisted that this case did not come within it, on three grounds: 1st. The plaintiff, before the Sheriff's sale, had conveyed all of his interest in the property to a trustee, who had a right to call for the title. The answer is: the legal interest of the plaintiff in this bond still continues. Whether he carries on this action for his own use or for the use of another, is beside the case.—This Court must act upon legal rights and has no concern with equities.

2nd. It does not appear that the plaintiff was able to pay the balance of the purchase money on the day it fell due, and it is to be inferred from his making an assign-

ment to pay the debts, which are still unpaid, that he was not. So he *first* became incapacitated and has no right to complain that the defendant was *afterwards* equally unfortunate. This objection is fully met in the case of *Lovelock* v. *Franklin*. The plaintiff was not *bound* to pay until his last note fell due. The defendant was bound to convey sooner, if the money had been tendered: and as he was incapacitated from doing so, a performance on the part of the plaintiff is dispensed with, and the enquiry, whether the plaintiff *would have* been able to pay the balance of the money, is precluded.

3rd. The incapacity was not caused by the act of the defendant, but by the act of law. The sheriff's sale was in "*invitum*" on the defendant's part. Several cases were cited, which show, that conditions not to assign or underlet leases, were not broken by an assignment under the bankrupt and insolvent laws. Those cases are all put upon a strict construction of the terms of the condition; and it is admitted by them, that if the terms of the condition are made broad enough to include assignments by force of the laws referred to, such an assignment would be a breach, although made by act of law, and in "*invitum*." In our case, the terms are broad enough. The defendant is to convey on payment of the purchase money. It makes no difference, so far as concerns the plaintiff, whether the inability is caused by a conveyance, made by the defendant or the sheriff, to pay his debts.

The second question is, as to the measure of damage.

We cannot yield our assent to the position assumed by the plaintiff, that he has a right in this action against one of the obligees, for a breach of a bond for title, to recover, as damages, the amount of the purchase money, which had been paid in the same way, as if the plaintiff had repudiated the contract and sued the vendor for money "had and received to his use."

In this action, the plaintiff does not repudiate the contract; but seeks to recover compensation in damage for its non performance; and the question is, what damage has he suffered? What sum will put him in as good a condition as if the contract had been performed? In that event, he would have got property which is worth $2500, but he would have been forced to pay the balance of the purchase money and interest. He has not paid this latter amount, and his damage is, the difference between that sum and the value of the property; which, by the case agreed, is $207 80, with interest from the 8th of May 1843. This gives the plaintiff his redress at law, by compensation in damages, which he has elected to pursue as his remedy. He had the right to file a bill in equity for a specific performance, and the decree would have been for a conveyance of the property, upon his paying the balance of the purchase money, with interest. He would not have been entitled to a decree for the amount of the purchase money, which he had paid; and there is no principle, upon which he can recover it, in this action upon the bond.

The only difference between his remedy at law and in equity upon the contract, is, that in the one count he gets the property by paying for it: in the other, he gets compensation in damages, which is the difference between the value of the property and the amount of the purchase money, remaining unpaid.

Our attention was called to the fact, that in the action for a breach of a covenant of quiet enjoyment, the measure of damage is, the price paid for the land, which is taken, as between the parties, to be the true value; and it was urged that $8000 should be taken as the value in this case, and not $2500, which is admitted to be the real value, at the time of the breach.

The analogy does not sustain the position, for which it was invoked; because the rule of damage in that action is founded on peculiar reasons. The covenant of quiet

enjoyment is a substitute for the old *real warranty*, the remedy upon which was by voucher, and if the demandant recovered, the tenant had judgment against the vouchee for other lands of equal value. This remedy could only be used in real actions, where the *land* was demanded. After the action of ejectment took the place of those actions, the Courts, to give effect to the warranty, were obliged to construe it into a covenant of quiet enjoyment; but allowed the new action to retain some of the peculiarities of the remedy for which it was substituted—among others, that of considering the price as the rule of damage in lieu of "other land of equal value." *Williams* v. *Beeman*, 2 Dev. 483.

There is nothing peculiar in the present action; and the general principle applies, that the plaintiff shall recover compensation for the injury which he has sustained.

The judgment of the Court below must be reversed, and judgment be entered for the plaintiff for $10,000, to be discharged by the payment of the sum of $207 80, with interest from the 8th of May 1843, according to the case agreed.

PER CURIAM Judgment accordingly.

WILLIAM H. GILLIAM *vs.* WYATT CANADAY.

The owner of land, injured by the erection of a mill, who has proceeded by petition, under which the annual damage assessed is as high as twenty dollars, and who has taken judgment for, and received the damage for, the whole five years, cannot maintain an action on the case, brought after the expiration of the five years, without having again ascertained the annual damage by proceeding under a second petition.

Appeal from the Superior Court of Law of Granville County, at the Fall Term 1848, his Honor Judge CALDWELL presiding.

Gilliam and *Graham*, for the plaintiff.
H. W. Miller, *McRae*, *T. B. Venable* and *W. H. Haywood*, for the defendant.

PEARSON, J. In 1835, one Taylor filed a petition against the defendant, under the Act of 1809, to recover damages for injury done to his mill and premises, by the ponding back of water by the mill dam of the defendant, so as to obstruct the plaintiff's wheel and otherwise injure his premises; and in 1838 a verdict was returned in his favor, assessing the annual damages at the sum of $20, and a judgment was thereupon rendered for the sum of $20, annually for five years, commencing in August 1834. It was admitted that the defendant had satisfied this judgment, and paid the last instalment in August 1839.

In 1841, Taylor sold his mill and land to the plaintiff, who commenced this action on the case in 1845.

The defendant insisted, that the action could not be maintained, as Taylor had received the damages for the

five years, and the plaintiff had not proceeded by petition to ascertain the annual amount of damage done to him.

His Honor decided that the action could be maintained.

It is clear that the plaintiff, as assignee, "stands in the shoes" of Taylor, and is entitled to his right to sue, so far as it is affected by the statute. "The right runs with the estate," like certain covenants, which follow the estate as incidents.

The broad question, then, is presented: can the owner of land, injured by the erection of a mill, who has proceeded by petition, under which the annual damage assessed is as high as $20, and who has taken judgment for, and received the damage for, the whole five years, maintain an action on the case, brought after the expiration of the five years, without having again ascertained the annual damage by proceeding under a second petition?—We think, by a proper construction of the statute, he cannot.

At common law, one whose land was injured to the smallest amount, had it in his power to issue a new writ every day, and was entitled to recover at least nominal damages in every one of his actions. This would carry costs, and he could break down his adversary, not by the amount of damages, but by the amount of costs.

The act of 1809 was passed to remedy this evil, in favor of persons erecting mills, and the *controlling idea* of that statute is, to prevent an action on the case from being brought against the owner of a mill, unless it be first ascertained by the verdict of a jury, that the annual damage, *during the time for which such action is to be brought*, amounts to $20 at the least.

To effect this purpose, the verdict is made binding for five years. If the annual damage is less than $20, the action cannot be brought. But if it is as high as $20, the action is allowed; and in that event, the verdict and

judgment thereon are only binding for the year's damage preceding the filing of the petition. So that, when the action is brought, it is for injury done during the four years, as to which it has been ascertained that the annual damage is as high as $20.

But suppose, instead of taking one year's damage and then bringing his action, the party receives the whole damage and brings his action after the expiration of the five years. He cannot declare for the injury done during the four years, because he has been satisfied for that. He must therefore declare for the injury done afterwards—that is, during a time, as to which the verdict is not binding, and during which it is not ascertained, whether the annual damage amounts to more or less than $20, which would be a plain violation of the controlling idea of the statute.

The correctness of this construction is confirmed by this additional consideration. When the action is brought, the statute contemplates that the plaintiff shall receive the annual damage for one year only. Now, if he receives the damage for the whole five years, he has, by his own act, made it impossible for this provision of the statute to take effect, and has no right, against the very words of the statute, to receive the damage for the whole five years, and bring his action also.

As an argument against this construction, it was insisted for the plaintiff, that, if the proceedings, under the petition, pended for more than five years, as is not unfrequently the case, the action could not be brought without another petition, which might also be protracted for more than five years, and so the action would be wholly defeated. There is more plausibility than force in this argument. For, consistently with this construction, the action can be brought after the expiration of the five years, supposing the proceedings to have pended that long, and the injury sued for is the damage done during the four

years, as to which the annual damage has been ascertained. If the plaintiff is allowed to add the time from the expiration of the four years to the issuing of the writ, as to which the damage has not been ascertained, it is a departure from the principle of the statute, made necessary by the action of the Courts. But it is not such an absolute and total departure from it, as the plaintiff asks to be allowed to make, when he seeks to recover for a time, as to no part of which the damage has been ascertained in the manner required by the statute, and the necessity for which is the effect, not of the slow action of the Courts, but of his own act, in receiving satisfaction for the whole time.

It is a *condition precedent* to the action, that the annual damage, during the time for which it is brought, shall be first ascertained to be as high as $20. This action is for damage between the years 1841 and 1845, and there is no telling whether the annual damage during this time was as much as $20. Many changes may have taken place since the rendition of the verdict in 1838, and the fact has not been ascertained in the mode required by the statute. The plaintiff's case is not within its words or its meaning. If he can maintain this action, he can maintain fifty more, and break the defendant down with costs; for there is no provision, that a non-suit shall be entered or that the plaintiff shall not recover costs, if it turns out on the trial, that the annual damage is less than $20. The protection, intended to be given to the owners of mills, can only be secured to them by the construction we have adopted.

The judgment of the Court below must be reversed and there must be a *venire de novo*.

Per Curiam. Judgment reversed and *venire de novo*.

THE STATE, ON THE RELATION OF LEMUEL WILLIAMS & AL. vs. WILLIAM BRITTON'S ADM'R & AL.

The next of kin cannot maintain an action on the administration bond, after the death of the administrator, because he failed to take into his possession, and distribute, certain negroes to which his intestate was entitled. These negroes pass to the administrator *de bonis non*, and are to be by him distributed.

The cases of *Taylor* v. *Brooks*, 4 Dev. & Bat. 143, and *State* v. *Johnson*, 8 Ired. 381 and 397, cited and approved.

Appeal from the Superior Court of Law of Bertie County, at the Spring Term 1850, his Honor Judge ELLIS presiding.

This was an action of debt on a bond executed by William Britton, with the defendants as his sureties, upon his obtaining letters of administration upon the estate of one Hodges Harrel. The breach assigned was, that Britton wrongfully delivered the slaves to the widow, instead of making distribution of them among the next of kin of the intestate.

It was in evidence, that Hodges Harrel died in January, 1839, and, at the ensuing February term of the Court of Pleas and Quarter Sessions of Bertie County, letters of administration were committed to William Britton, who gave the bond, upon which this suit is brought. It was proved that the wives of Williams and Cox were the children of the intestate, and the other relators were the children of another daughter by the same mother; and they, with the widow and her children, were the only persons who were entitled to distribution of the estate of

Harrel. A negro, Lucy, was bequeathed by John Acre, to his daughter, Patience Harrel, wife of the said Hodges Harrel, in 1814; which negro was delivered, by the executor of Acre, to Hodges Harrel. Lucy had a child by the name of Ann, who is now the mother of five children. These negroes were in the possession of Harrel, at his death, and continued among his assets, when Britton became his administrator. It was proved, that Harrel sometimes threatened to sell these negroes: at other times, he spoke of them as belonging to his wife, and expressed a wish to sell them, if his wife would agree to it, as he thought it was hard he should have to raise negroes for other persons. Britton, after he administered upon the estate of Harrel, never took the negroes into his possession, but let them remain in the possession of the widow. At the time of the sale of the perishable part of the estate of Harrel, which took place shortly after his qualification, Britton said, he should have nothing to do with the negroes, as they, under the will of John Acre, belonged to the widow for life. Britton died in 1845, having, before his death, settled the estate of Harrel.

His Honor, Judge Ellis, intimating the opinion, upon the foregoing statement of facts, that the action could not be maintained, the plaintiffs, in submission thereto, suffered a non-suit.

Rule for a new trial. Rule discharged. Judgment and appeal.

Bragg, for the plaintiff.

A. Moore, for the defendant.

Pearson, J. The only question presented in this case is, can the next of kin maintain an action on the administration bond, after the death of the administrator, because he failed to take into his possession, and distribute, certain negroes to which his intestate was entitled?

His Honor was of opinion that the action could not be maintained, and we fully concur with him.

Taylor v. *Brooks*, 4 Dev. and Bat. 143; *State* v. *Johnson*, 8 Ired. 381 and 397, are in point and settle the question.

The name "*administrator de bonis non*" explains itself. That officer is to take charge of all the estate, which has not been administered; and is to finish whatever has been left undone by the first administrator. Assets are administered by taking them into possession and paying them over to creditors, or to the next of kin, in the course of distribution. Both acts must concur, before the goods can be said to have been administered. In regard to the negroes, which are the subject of controversy in this suit, neither act has been done, and they are, to all intents and purposes, *unadministered*.

PER CURIAM. Judgment affirmed.

ANDREW DUKE vs. SOLOMON ASBEE.

A person, who, on the day of, or previous to, an election, furnishes liquor, either at the request of a candidate or any other person, with a belief that such furnishing of liquor is for the purpose of influencing the electors, cannot recover his account against the person ordering the supplies, because the contract is against good morals, and the purity of elections, and because such conduct is prohibited by our Statute law.

Appeal from the Superior Court of Law of Currituck County, at the Spring Term 1850, his Honor Judge ELLIS presiding.

This was an action of assumpsit upon an account.

The plaintiff was introduced as a witness under the book-debt-law, and testified, that in the summer of 1849, the defendant was a candidate for the office of Superior Court Clerk for the County of Currituck, and that the plaintiff retailed spirituous liquors in the said County: That the defendant, during the canvass between himself and the present incumbent, requested of the plaintiff repeatedly to let him have and to furnish his friends, upon public occasions, what liquor and other articles in the said account enumerated, by the small measure or otherwise, they might desire: That, upon the call of Mr. Asbee, previous to the election day, for liquor and other articles for himself and friends in the election, he set out accordingly as he or they may have requested. At other times, when the defendant was not present, according to a previous understanding with the defendant, and upon the call of his friends in the election, he furnished them with liquor, and all of which was drunk on public grounds at public gathering places; and the plaintiff had engagements of the like kind with other candidates, during the said election year, and, under the said engagements, furnished them and their friends with liquor in the like way: That the plaintiff furnished to all persons indiscriminately, who called upon him in the names of the candidates liquor, &c., under the arrangement aforesaid, both before the election and on the day thereof.

The plaintiff further swore that he did not deal out the liquor, &c., as above stated, with any design of influencing the election, and did not vote for the defendant.—The plaintiff here closed his case: and the defendant insisted, that the plaintiff was not entitled to recover, because the contract was against good morals and therefore void, upon the ground that treating at elections was prohibited by statute and a penalty annexed.

The defendant then insisted, that treating at elections was prohibited by law, a penalty being attached thereto, and requested his Honor to charge the jury, if the defendant's object was to influence votes at the election, and the plaintiff knew it, then the plaintiff could not recover.

The presiding Judge instructed the jury, that if they believed the testimony, the plaintiff was entitled to recover.

The jury returned a verdict for the plaintiff, upon which, judgment was given. Rule for a new trial granted and discharged. Appeal to the Supreme Court prayed and granted.

H. Burgwin, for the plaintiff.
Jordan, for the defendant.

Nash, J. In 1801, the Legislature passed an act to punish the crime of bribery at elections. Rev. Stat. ch. 52. sec. 23. The preceding section of the act makes it highly penal for any person, who is a candidate for a seat in the legislature, to give, either directly or indirectly, any money, gift, gratuity, or reward, &c. in order to be elected, and embraces all persons who shall do either of the acts "to procure any other person to be elected."—The penalty is a forfeiture of four hundred dollars. The 23rd sec. forbids *treating* with either meat or liquor, on *any day of election or on any day previous thereto*, with intent to influence the election, under the penalty of two hundred dollars. The 22nd sec. of the act of 1836 is taken from the 11th sec. of the 116th ch. of an act passed in 1777, and the 23rd was originally passed in 1801. The policy of these two acts is the same with that of the British Statute passed in the 7th of William the 3rd, ch. 4th. It is remarkable, that the acts of the General Assembly passed in 1760, and the act of 1877, both omit a provision, contained in the Statute of William, and a most impor-

tant one, for the suppression of the offences at which they were aimed. The Stat. of William, among other acts of bribery, enumerated the giving of "meat, drink, and entertainments, &c." These are omitted in our acts of 1760 and 1777; but the material words embracing them all are brought forward in the act of 1801. I mention these circumstances to show the anxiety, which the legislature has at different times exhibited, to keep pure the elective principle of our government.

The acts of our assembly bear so striking a likeness to the English Statute, that, although the latter never was in force here, the decisions of the English Courts under it are very safe guides to us. The case of *Rebbans* v. *Crickett*, 1 Bos. and Pul. 264, was very similar to the one now under consideration. The 2nd count was for provisions furnished the voters at the request of the defendant, and it was decided the plaintiff could not recover, because the contract was *malum prohibitum*, of a very serious nature in the opinion of the legislature, who had drawn a very strict line, which was not to be departed from. This doctrine was affirmed in *Lophouse* v. *Wharton*, 1 Campb. 550, note; nor is it necessary that the person treating should be the agent of the candidate, or act with his knowledge; in either case, he, the person treating, is within the provisions of the statute. *Ward* v. *Nanny*, 3 Car. and P. 390; 14 E. C. L. R. 369. If a mercer sells ribans, knowing that they are to be distributed among voters, he cannot recover the price. *Richardson* v. *Webster*, 3 Car. and P. 128; 14th E. C. L. R. 238; and, so, if a candidate pay the expenses of buying out the freedom of voters or pay their travelling expenses, they incur the penalty of the statute. 1st Sel. N. P. page 12. *Bayntun* v. *Cattle*, 1st M. and Rob. 265. Such have been the decisions of the Court under the English Statutes, and they are safe guides to us in putting a construction upon our act, if we need any. The language of the act of 1801,

Rev. Stat. ch. 52, sec. 23, is plain and perspicuous: "If any person shall treat with either meat or drink on the day of election or on any day previous thereto, with intent to influence the election, &c." It is then illegal to treat at any election for the purpose set forth in the act, and if so, a contract, founded on such act, is illegal and void, and can not be enforced in a Court of justice.—Whether, therefore, the person who gives the bribe, be a candidate or not, or whether he be the agent of one, or whether or not he acts with the knowledge or consent of a candidate, he incurs the penalty of the act, if his object be to influence the election; and any contract made by him, with *any* person, for payment of such treating, is null and void. No one, on reading this case, can for a moment doubt the intention, with which the treating was done; the testimony comes from the plaintiff. The defendant was a candidate for the clerkship of the Superior Court of Currituck County, and during the canvass, requested the plaintiff to let him have "*and to furnish his friends* on public occasions, what liquor and other articles they might want." Can any one hesitate for a moment, as to the object of the defendant: and can any doubt exist as to the knowledge of the plaintiff of his object and intention. It is true, the plaintiff swore *he* had no intention, in furnishing the articles contained in his account, to influence the election, as he voted against the defendant, and as he furnished the opposing candidate and his friends in a similar way. If this were a suit against the plaintiff, to recover the penalty inflicted by the act, it would become important to enquire into his object and intention in furnishing the liquor and provisions; and whether he could escape this responsibility by showing, that instead of pandering the to passions of the friends of one of the candidates, he had furnished his efforts to corrupt those who were opposed to him. For the present, our enquiry is not, whether *he* intended to influence

the election, but whether the defendant did not and whether *he* did not know such to be the fact. The jury were instructed, if they believed the evidence, the plaintiff was entitled to a verdict. In this there was error. They ought to have been instructed, that, if, from the testimony, they believed it was the intention of the defendant to influence the election by the meat and drink furnished by the plaintiff, and that intention was known to the plantiff, the latter could not recover.

If in England the purity of the ballot box is considered so important, how much more sedulously ought it to be guarded here. Upon the virtue and intelligence of the people our Institutions rest; nor can they be endangered, until these principles are lost sight of. The legislature has done its part, and if its enactments are enforced, by those to whom the duty belongs, much may yet be done to give them stability and vigor. And, among the most corrupting practices of candidates for office, is the one we are considering in this case; it is bribery of the most vicious and destructive tendency, and deserves to find no favor, either in courts of justice or from the people themselves. Whenever the offence is known to exist, the law ought to be rigidly enforced.

For the error in the charge pointed out, the judgment ought to be reversed and a *venire de novo* awarded.

Per Curiam. Judgment reversed and a *venire de novo* awarded.

JOHN CRAWFORD'S ADM'R *vs.* STEPHEN GLASS'S EXE'RS.

Where there is an action on a bond against two obligors, and a non-suit is entered as to one, this is no *retraxit* as to him.

Appeal from the Superior Court of Law of Alamance County, at the Spring Term 1850, His Honor, Judge BARTLE, presiding.

This was an action of assumpsit brought to recover money, paid by the plaintiff, as surety for the defendants' testator.

On the part of the plaintiff it was proved, that his intestate executed a bond with the defendants' testator to one Morphis, for one hundred dollars. He then produced the record of a recovery against them in Chatham Superior Court of Law, in a suit on the said bond, and proved that he had paid and satisfied in full the judgment and costs. He then introduced a witness, who testified, that, while the suit was pending against the plaintiff, he, the witness, met the defendants' testator, who informed him that he had been to Chatham Court to attend to the said suit, that the plaintiff's intestate was his surety, and that his estate should lose nothing by it.

The defendants relied on a former judgment, in favor of their testator, in a suit brought against him, upon the bond in question, and the fact that he had paid it before the suit was instituted against his surety. They produced the record of the suit, in which it appeared, that it was commenced against both the obligors in the bond, but a *nol. pros.* entered as to the present plaintiff's intestate;

and, upon the trial upon the issues joined with the present defendants' testator, he had a verdict and judgment in his favor. The defendants then introduced a witness, who proved the payment of the bond by their testator, before the institution of any suit on the bond. This witness also proved, that when the bond was paid, the holder did not have it with him, but promised to deliver it up to the maker, to be cancelled, in a short time. This he failed to do, but afterwards, and long after the bond was due, endorsed it to the person, who brought the suits, above mentioned, upon it. The defendants' testator died before the institution of the suit against the present plaintiff.

The plaintiff contended, that, upon showing that his intestate was the surety of the defendants' testator, and that the money was received from him in a suit on the bond, which he had executed as surety, without any collusion on his part, he was entitled to recover what he had thus paid; but at all events he was entitled to recover, if the defendants' testator undertook the management of the suit against the present plaintiff, and managed it so negligently and unskilfully that a recovery was had against him. The defendants contended, that their testator was entirely discharged from any responsibility to his surety, by paying the debt, and showing, that in the suit on the bond, he had a verdict and judgment in his favor; and that there was nothing in the plaintiff's testimony to waive that responsibility. They also contended that the entry of *nol. pros.* as to the plaintiff's intestate in the first suit on the bond, was equivalent to a *retraxit*, and that the plaintiff in that suit was thereby relieved from any further action against him.

The Court instructed the jury, that the payment of the bond by the defendants' testator, and the verdict and judgment in his favor in a suit against him, upon the bond, was a complete defence against the claim of the plaintiff, though a recovery was afterwards had against

him as surety of the said testator; but that, if the jury believed, that the testator had undertaken the defence of the suit against his surety, and conducted it so negligently and unskilfully that a recovery was had against the surety, then he was responsible for the money so recovered of, and paid by, his surety, and that his death before the termination of such suit made no difference. The Court was also of opinion that the *nol. pros.* in the first suit on the bond as to the plaintiff's intestate made no difference.

The plaintiff had a verdict. The defendants moved for a new trial for misdirection to the jury. The motion was overruled. Judgment was given upon the verdict and the defendants appealed.

Norwood, for the plaintiff.

Graham, for the defendants.

Nash, J. The only points, presented by the case, for our review, are the opinions expressed by his Honor below, as to the character and effect of the non-suit entered as to the intestate, Crawford, in the original suit on the note against Glass and himself, and the portion of the charge relating to the management of the suit, in Chatham against Crawford. We concur with his Honor as to the first; the entering the non-suit, as set forth, was no *retraxit*. *Tidd's Pr.* 175. 1*st. Strange* 439. As to the other point we do not agree with him. The charge is "that if the jury believed that the testator, Glass, had undertaken the defence of the suit against his surety, and conducted it so negligently and unskilfully, that a recovery was had against the surety, then he would be answerable for the money, so recovered of and paid by his surety, and that his death, before the termination of the suit, made no difference." There was no evidence of an agency to go to the jury. The declaration of Glass, as stated

in the case, was that he had been to Chatham to attend to the suit against Crawford. Every witness who goes to Court to give his testimony in a case, goes to attend on that suit; and his compensation is, by the law, designated to be for his attendance at Court. But if there was evidence to show that Glass had undertaken the defence of the suit, there was none to show any negligence in the management of it by him, and surely none, which took place after his death, could affect him. When it was his declaration was made, at what stage of the case, whether at the return turn or a subsequent one, we are not informed. He died before the termination of the suit. If he had lived until the trial, no doubt the evidence of his payment of the debt, for which Crawford was his surety, would have been before the jury. This is satisfactorily shown by his declaration, that Crawford was his surety and his estate should not suffer.

PER CURIAM Judgment reversed and a *venire de novo* awarded.

DEN ON DEMISE OF JOSEPHUS TRIPP *vs.* JAMES POTTER.

On a *scire facias* against heirs to subject the lands of their ancestor, it is too late for them, after they have appeared and pleaded to the *scire facias*, to move to dismiss the proceedings because no declaration has been served on them, although some of the heirs may have been infants.

The case of *Love* v. *Scott*, 4 Ired. 79, cited and approved.

Appeal from the Superior Court of Law of Beaufort County, at the Special Term in January 1850, his Honor Judge BATTLE, presiding.

Donnell, for the plaintiff.

J. H. Bryan and J. W. Bryan, for the defendant.

NASH, J. This action was originally brought against James Potter, and, upon his death, during its pendency, the *scire facias* issued within the time prescribed by the act of 1799, Rev. Stat. ch. 2, secs. 7, 8, 9. Some of the heirs were of age, others were infants. At the return term of the *sci. fa.* the heirs all appeared, the infants by their guardians, we presume, and entered into the common rule and pleaded not guilty. After the suit had been pending for several terms, a motion was made by the defendants, that "the Court should make an order, that the suit had abated, because no declaration had been served upon them." This motion was refused by the Court. By the act of 1799, it is directed, "that after the death of a defendant, the action of ejectment may be revived, by *serving* on the heirs at law, within two terms after his decease, a *copy of the declaration*, together with a notice to the heirs to appear and defend the suit, and, after such service, the suit shall stand revived." To complete the service in such a case, there is no doubt a copy of the declaration must accompany the notice. This was not done, and there was no obligation upon the heirs to appear.—But they did appear and made themselves parties defendant, by entering into the common rule. If they had declined to appear, the Court, upon the fact being brought to their notice, would have made an order, that a copy of the declaration should be served upon them, or have dismissed the *sci. fa.* and abated the suit; or if the cause had been proceeded in, without their appearance, and judgment entered against them, it would have been erroneous, not affecting their rights. *Love* v. *Scott*, 4th Ired. 79. The defendants came too late; the time was passed for them to make their motion; their appearance cured the defect complained of. There is a proper time

and mode for taking advantages of errors in proceedings. If there has been no process, or if it be defective in point of form, or in its direction, service or nature, the defendant may move to set aside the proceedings for irregularity. But, he cannot, after he has appeared, take advantage of any such error. His application must be made as early as possible, or, as it is commanly said, *in the first instance*. He cannot, when he has overlooked it, or taken subsequent steps in the cause, turn back and object to it. 1st East. 77; 3rd Term R. 7; 1st Tidd's Pra. 161, 162.—For the reasons assigned, we are of opinion, that no error was committed. The case of Scott only proves, that, in an ejectment, when the defendant dies, a *sci. fa.* and a copy of the declaration must be served on the heirs, within two terms after the death of the defendant, or the suit will stand dismissed. It is not sufficient to apply for the process within two terms. If the proceeding attempted in this case could succeed, it would be in the power of an heir to come into Court, cause himself to be made defendant without any process against him, enter into the common rule and lie by until after two terms have passed, and then throw the case out of Court, for the want of a declaration being served as the act directs. This would be a surprise upon the plaintiff and depriving him of a privilege secured to him by the law—that of reviving his suit against the heirs within two terms.

Per Curiam. Judgment below affirmed.

EDWARD STANLY & WIFE vs. JOAB WATSON.

An appeal will not lie from the decision of the County Court, upon a petition for draining the petitioner's lands, through those of others.
The case of *Collins* v. *Haughton*, 4 Iro. 420, cited and approved.

Appeal from the Superior Court of Law of Beaufort County, at the Spring Term 1850, his Honor Judge BAILEY presiding.

This is a petition in the County Court against Murray, Watson, and three others, for leave to drain flat lands, belonging to the plaintiffs, by means of a canal through the lands of the defendants to a certain creek, according to the statute. Murray answered, that he had never prevented the plaintiffs from draining through his land, but, on the contrary, upon being informed of their desire to drain, that he had proposed to unite with them in cutting a canal through his land, in such a way as to enable both of them to drain into it: and that, without giving him any answer thereto, or making any other proposal, the plaintiffs filed the petition. Watson put in a similar answer. The other defendants made no answer or opposition to the prayer. The County Court appointed twelve freeholders to go on the premises and examine, whether the canal was necessary, and, if it was, to direct how it should be cut, &c., as prayed for and directed by the statute; and from the order, the parties, Watson and Murray, appealed. In the Superior Court it was ordered, that the petitioners should have the drain as prayed for,

but the same defendants were allowed an appeal therefrom to this Court.

Donnell, for the plaintiffs.
Shaw, for the defendants.

RUFFIN, C. J. There seems to be nothing in the objection raised in the answers ; for at most it ought only to affect the costs, and they are payable by the petitioners at all events under the statute. Indeed, an agreement between the petitioners and two of the defendants, as to direction and size of the canal through their respective tracts of land, would not be material in respect to the proprietors of the other tracts, and the petition would, therefore, be unavoidable. The statements in the petition are, probably, too vague in respect to the *termini* of the proposed canal, and the ownership and description of the parcel or parcels of land, through which the petitioners desire to drain ; and, perhaps, it would be difficult to support a title by means of an inquisition taken under it, without giving it more precision by an amendment. But the Court does not consider that point: since, whether the petition be sufficient or not, the decision of the County Court is not subject to review upon appeal, and the Superior Court has no jurisdiction to entertain the case upon its merits in point of fact. The case of *Collins* v. *Haughton*, 4 Ired. 420, establishes, that the inquisition must be exclusively under the order of the County Court, and that no appeal lies in a case of this sort under the act. *Rev. Stat. ch.* 40. His Honor ought not, therefore, to have entertained the appeal, but have dismissed it, as having been improvidently allowed. Instead of doing so, however, the Court proceeded to determine the merits *de novo* upon the matters of fact and law. In doing so there was error, according to the case cited, and, as we think, the proper construction of the act. The opinion of

the Court, therefore, is, that the order of the Superior Court ought to be reversed. This will be certified to that Court, to the end that the appeal be there dismissed and a *procedendo* awarded to the County Court.

PER CURIAM. Ordered accordingly.

WILLIAM W. GRIFFIN *vs.* ISAIAH SIMPSON.

Money, belonging to an intestate, used by his widow after his death, must be accounted for by her to the administrator.

Appeal from the Superior Court of Law of Pasquotank County, at the Spring Term 1850, His Honor, Judge ELLIS, presiding.

Burgwin, for the plaintiff.
Heath, for the defendant.

NASH, J. The action is in assumpsit, to recover a sum of money, left by the plaintiff's intestate at the time of his death, and, which, it is alleged, came to the hands of the female defendant, and which was used by her. The defence was, that the money, if used by her, was used in burying the intestate and supporting the family, and that not more was left by him than was necessary for those purposes. His Honor instructed the jury, that the defendant, Mrs. Simpson, as the widow of her deceased husband, had a right to use as much of the money on hand, as was necessary to pay the funeral expenses and also

as much as was absolutely necessary for the support and maintenance of the family, until her year's provision was assigned her. The case states that, at the time James Brothers, the intestate, died, he left an ample store of necessary provisions.

We do not concur with his Honor in the view he took of the law in this case. The privilege of a widow, upon the death of her husband, intestate, to interfere with the personal property left by him, is clearly pointed out by the 17th sec. of 121st ch. of Revised Statutes. By that section it is provided, that "she may take into her possession and charge, the whole of the personal estate, and to use so much of the stock, crop and provisions, then on hand, as may be absolutely necessary for the support of herself and family, until administration is granted, when her right to the possession of said estate shall cease." It is by virtue of this statute alone, that a widow is, in this State, authorised to interfere with the personal property of her deceased husband. It is conceived in a spirit of kindness to her and the family, and frees her from the risk of becoming an executor of her own wrong, which any intermeddling with it would otherwise have made her. By the charter of Henry 1st, and by *Magna Charta*, she was entitled to her quarantine, which is the right to remain in the capital mansion house of her husband for forty days, within which time her dower was to be assigned her. Of the personal property no mention is made, nor until the act above recited, originally passed in 1796, was she, in this State, authorised to intermeddle with the personalty. It all belonged to the administrator, when appointed, and his letters related back to the death of the intestate. Until such appointment, any person, as well the widow as others, who intermeddled with the assets, except to take care of them, made himself an executor of his own wrong. The act of 1796 made the possession of the widow a rightful one, and invested her with the pow-

er to use a certain portion of the stock, crop, and provisions on hand, for a certain and specified purpose. This right existed until administration granted, and it is made her duty to take out letters, at the next term of the County Court, succeeding the death. But the act nowhere authorizes the widow to use the money, which is left; as to it she stands as any other person, and if she does use it for any purpose, she is using money that does not belong to her, and must account for it to the administrator. His Honor charged, that she had a right to use as much of this money, as was necessary to defray the funeral expenses and to purchase such provisions, as were absolutely necessary for the support of herself and family, until her year's provisions were assigned her. The latter branch was uncalled for. From the case it appears, that at the death of Mr. Brothers, the intestate, he left his family amply provided with everything necessary to their comfort. It was not necessary, therefore, for the widow to purchase any thing. But the charge was wrong in principle. If there had been a deficiency of crop, stock and provisions on hand, and the widow had used the money of the estate, she would have done what the *law* did not allow. So also as to the funeral expenses. The speedy interment of the body was demanded alike by a decent regard to the opinion of the community, the rights of humanity, and the comfort of the family. And upon whom does that duty more appropriately devolve, than upon the surviving head of the family. But it is a moral and not a legal duty—one of imperfect obligation. Imperfect, so far that the law cannot compel the surviving wife to perform it—and yet so strong, that its neglect would be punished by the universal execration of the community. While, therefore, no voice could be raised to condemn the act of a widow, who uses so much of the money of the estate, as may be necessary to deposit in its resting place the body of her husband, the

law with a stern adherence to the rights of others, disavows the right to do so. She had no authority to make use of the money of the estate. In doing so, she became responsible to the administrator, when appointed, and the most she could claim would be to be considered as an executor in her own wrong, in which capacity, her disbursements in discharge of the liabilities of the estate would be allowed her. For, although funeral expenses are not strictly a debt due by the estate, it is a charge upon it, and to be paid as "*opus pium et caritatis*," before any debt or duty whatever. 3rd Coke's Institutes 22, Toller 191. The instructions given to the jury on both points were erroneous. Mrs. Simpson, as the widow of the intestate, her former husband, had no legal right to use the money belonging to the estate for either of the purposes designated.

The judgment must be reversed and a *venire de novo* ordered.

RUFFIN, C. J. The act of 1796 entitles a widow to use as much of the crop, stock, and provisions left by her intestate husband, as may be necessary for the support of herself and the family, until the administration granted. But neither that act nor any other authority confers any power on her, more than on any other person, to use money left by the intestate for any purpose whatever.—Therefore she must account to the administrator for whatever comes to her hands, like every other person would. If the widow had defrayed the expenses of the funeral, she might have been allowed them, as far as they were proper, in reference to the estate, by way of abatement in the amount recovered. But there was no evidence, that the widow conducted the funeral or paid any part of the expenses of it; and she was bound therefore to pay the plaintiff all the money she took, and the in-

structions were erroneous, and the verdict wrong as to the whole sum.

PER CURIAM. Judgment reversed and *venire de novo*.

WILLIAM R. STREET *vs.* JOHN A. MEADOWS.

It is not competent to introduce, as a witness, a member of a firm, to prove that his individual board or any other individual debts were to be paid by the firm.

The cases of *Cotton* v. *Evans*, 1 Dev. & Bat. Eq. 284; *Norment* v. *Johnson*, 10 Ire 89; *Willis* v. *Hill*, 2 Dev. & Bat. 231; *Cummins* v. *Coffin*, 7 Ired 196, and *Washing* v. *Wright*, 8 Ired. 1, cited and approved.

Appeal from the Superior Court of Law of Craven County, at the Spring Term 1850, his Honor Judge BAILEY presiding.

W. H. Haywood, for the plaintiff.
J. H. Bryan and *J. W. Bryan*, for the defendant.

PEARSON, J. This was an action for board furnished to one Clark. To make out his case the plaintiff called said Clark as a witness. The defendant objected, but his testimony was admitted. He swore, that a copartnership was entered into by the defendant and himself to carry on the tin business, in the town of Newberne: that he applied to the plaintiff to furnish him with board and agreed to pay for it in the name of the firm: that board was furnished accordingly and was charged to the firm by the plaintiff.

He swore farther, that his reason, for contracting in the name of the firm (and he so stated to the plaintiff) was because it was one of the articles of the copartnership, that his board should be paid for by the firm: that it was not set out in the written articles executed by the defendant and himself, but it was expressly agreed upon, when the copartnership was formed, and he insisted that it should be inserted, but upon the defendant's saying, "their word was as good as their bond," he consented to execute the articles without having it inserted. Clark was the only witness.

The defendant excepts, because of the reception of his testimony. We think the exception is well founded. It is an abuse of power for one member to attempt to bind the firm for the payment of his private debts, whether it be an antecedent debt, or one about to be contracted, for his board, or clothes, or any other personal expenditure. The mere fact, that he asserts at the time, that he is allowed by the firm to do so, can make no difference, for the act of doing it amounted to such an assertion in every case. *Cotton* v. *Evans*, 1 Dev. & Bat. Eq. 284. *Norment* v. *Johnson*, 10 Ire. 89.

In order to bind the firm, it was necessary for the plaintiff to prove that Clark had the authority of his partners to bind the firm, for his private debt, or that they afterwards acquiesced in it.

No acquiescence is alleged, nor is it alleged that Clark had this authority, unless it was given to him by the original agreement creating the firm. So the only question is, was Clark a competent witness to prove that the original agreement gave him this authority? We hold he was not. From the existence of a firm the law implies that each of the members has certain powers, and, if the firm seeks to put any restriction upon these powers, the fact that such restriction is contained in the articles of copartnership, will not bind a third per-

son, unless it is also proven, that he had express notice of it.

The question here is precisely the reverse. A third person seeks to add to these powers the authority of a member to bind the firm for his private debts—and this, not by the written articles of copartnership, nor by the testimony of a third person, but by the oath of the debtor.

If this was admissible, the firm would be entirely at the mercy of each of its members; for, each might pledge the firm for his private debts, and his oath would suffice to fix the liability. Such a position is inconsistent with the very existence of all copartnerships. The bare statement of it shows that it cannot be law. *Willis* v. *Hill*, 2 Dev. & Bat 231.

It is said, the debtor in such cases stands indifferent: for, if the plaintiff fails, the witness remains liable; if he succeed, then, the defendants, after paying the debt, can recover the whole from the witness, unless the authority existed: and the record of the first suit could not be used in his favor. So, it is insisted, he has no interest in the result of the suit. The substance of it is, that a witness may, by his own oath, shift his debt upon the defendants, because the latter in an action for "money paid" can recover the whole back from the witness. This reason is very unsatisfactory, if we suppose such an action could be maintained. For it puts every one in the power of any debtor, who will take a false oath. But in this case the witness and the defendant are partners; and, if, by the oath of the witness, his private debt is fixed upon the firm, the firm cannot maintain an action at law, for "money paid," against him, to recover it back. The only relief of the firm would be in equity, and it is well settled that a Court of law can only regard legal rights and liabilities, and must not act upon the supposition that there is another forum, before which more complete justice can be obtained.

The plaintiff's counsel relied upon *Cummins* v. *Coffin*, 7 Ire. 196, and *Washing* v. *Wright*, 8 Ired. 1.

In the former case, it is held, that when the fact to be proven is one that may be established by the *admission* of a partner, his statement upon oath is admissible; for the oath does not weaken the admission. The deposition offered by the plaintiff was treated as a mere *statement* upon oath; for the deposition of the same witness, offered by the defendant, was rejected; whereas, if the plaintiff had been permitted to use the deposition in the strict sense of its being the testimony of a witness called by him, the defendant would surely have been at liberty to continue the examination. But it is expressly put upon the footing of a mere written statement, on oath, of a fact which it was competent to establish by proof of a simple admission. So that case has no bearing.

It is held in *Washing* v. *Wright*, which is based upon *Blackett* v. *Weir*, 11 Eng. C. L. R. 257, that a member of a firm is competent to prove that the defendant is also a partner and liable for the debt. These cases proceed upon the reasoning insisted on by the plaintiff's counsel in this case, and upon which we have already remarked.

We are not willing to extend the principle farther than it has been carried by decided cases. This is an attempt to extend it greatly beyond that limit, and to put it in the power of every member of a firm to shift his private debts upon the firm, by simply swearing that he had authority to do so, and thus add to the powers implied by law. This consequence, so fatal to the existence of all copartnerships, has nothing to support it but the idea, that the defendants may have redress in equity, and we do not adopt it to the extent contended for. *Bland* v. *Ansley*, 5 Bos. & Pull. 331. ——— v. *Webb*, 1 Johns., are in point.

There must be a *venire de novo*.

Per Curiam. Judgment reversed and *venire de novo*.

THE STATE ON THE RELATION OF SOLOMON BLYTHE vs. JOAB OUTLAND & AL.

Constables are not general collecting agents, except so far as relates to claims within the jurisdiction of a magistrate. Therefore, where an order of the County Court was put into a constable's hands for collection, *Held*, that though he received the money, his sureties were not liable.

The cases of the *State* v. *Mangum*, 6 Ired. 369, and *State* v. *Long*, 7 Ired. 379, cited and approved.

Appeal from the Superior Court of Law of Northampton County, at the Spring Term 1850, His Honor, Judge MANLY, presiding.

B. F. Moore, for the plaintiff.

Bragg, for the defendant.

PEARSON, J. Blythe put into the hands of one Powel, a constable, for collection, the following County order:

"Ordered by the Court, that the County Trustee pay to Solomon Blythe, sixty-three dollars for rebuilding bridge," &c.

THOMAS HUGHES, Cl'k.

Issued 4th July, 1842.

Powel received the money, and, upon demand, refused to pay over. The question is, are the sureties upon his bond liable? We think with his Honor, that they are not.

It is settled by *State* v. *Mangum*, 6 Ired. 369, and *State* v. *Long*, 7 Ired, 379, that the sureties of a sheriff or constable are only liable for such claims as are within the

jurisdiction of a single justice and may be recovered by warrant.

The claim in this case was upon a County order and of course was not within the jurisdiction of a single justice, and could not have been recovered by warrant; so it falls within the very bounds of the rule above announced.

It was not the intention of the Legislature to make constables *general* collecting agents, except so far as relates to claims within the jurisdiction of a magistrate. This was the extent of the evil and to this the statute must be confined.

PER CURIAM. Judgment affirmed.

THE STATE TO THE USE OF DUGALD McCOLL & AL. vs. THE JUSTICES OF ANSON.

When a criminal is case removed for trial from one County to another, in which the prisoner is convicted, the expense of guarding the jail in the County, in which the conviction takes place, must be defrayed by the County from which the case was removed.

Appeal from the Superior Court of Law of Anson County, at the Spring Term 1850, his Honor Judge SETTLE presiding.

Strange, for the plaintiff.

Winston, for the defendant.

Nash, J. The relators join in this proceeding for a mandamus. A man, by the name of Martin, was indicted in Anson Superior Court for murder, and the cause was duly removed for trial to Richmond County. There it was tried and the prisoner convicted. After the conviction, a guard was ordered out by the proper authorities, to guard the jail. The property of the prisoner was exhausted, in the payment of his linbilities, and the several individuals, composing the guard, applied for a mandamus, to compel the County of Anson to pay the costs of their services. Several reasons were assigned by the defendant, why the writ should not issue. The first is, that the claims of the relators are several, and not joint, and therefore they could not join in the application—the last, that the County of Anson is not liable. The presiding Judge, believing the first objection fatal, discharged the rule, not passing upon any other. The last is the main one, as it affects the rights and liabilities of the parties. Consequently, that, though not decided in the Superior Court, was principally argued here, and the Court has thought it proper, for the satisfaction of the parties, to express its opinion upon it.

The question arises solely under the acts of our Legislature. A slight review of them will serve to bring the point in controversy plainly before us. It is a principle of the common law, that every criminal offence shall be tried in the County in which it is perpetrated. Under our system of administering the law, it is sometimes found that justice demands this principle should be departed from. Accordingly an act was passed in 1801, Rev. St. ch. 31, s. c. 120, in which power is given to a Judge of a Superior Court, upon a suggestion on oath, by either party to the suit, that justice cannot be done, to remove the cause for trial to an adjoining County. Under this act the prosecution of Martin was removed to Richmond County for trial. There it was tried and the prisoner convicted.—

After the conviction, a guard was, by the proper officer of the County, ordered to guard the jail. This proceeding was had under an act passed in the year 1795, Rev. St. ch. 90, sec. 5. By this section a Judge of the Superior Court, being in the County in which the prisoner is confined, is authorised to direct the commanding officer of the County to furnish to the sheriff or jailor such a guard as may be suitable to the occasion; it further provides that "the guard so ordered out shall receive such compensation, as is or may be provided by law for the militia." Upon the requisition of the Superior Court, then in the County of Richmond, a guard was called out by the commanding officer of the County—and the enquiry before us, is, which County, that where the prosecution commenced, or that where the trial was had, shall bear the burthen of guarding the jail. By an act passed in 1808, ch. 757, sec. 1, it is provided, that "the several County Courts of Pleas and Quarter Sessions shall lay such a tax, &c, as shall be sufficient to pay off the expenses to be incurred for guarding the jail, and removing persons to other Counties." Previous to this period, it was a burthen borne by the public treasury. The second section provides, "that hereafter all claims for guarding of prisons and conveying of prisoners, shall be allowed by the Court of the County in which such prison is situated, or from which any person is removed." By the first section of the act of 1810, Rev. Stat. ch. 28, sec. 14, it is enacted, "that in all cases where the counties are liable to pay costs, those Counties, wherein the offences shall have been charged to be committed, shall pay them. And all fines, forfeitures, and amercements, shall be accounted for and paid to the trustee of the County, wherein the offence may have been charged to be committed, wherein such fines, forfeitures, and amercements, as may have been charged, shall have arisen." If during the pendency of the prosecution of Martin in Richmond, any fine, forfeiture or amercement,

had been incurred in any way, though collected in that County, they would have gone to the trustee of the County of Anson. As this fund then, and all derived from a similar source in the latter, go to constitute, with the appropriate tax, the fund for defraying these expenses, it would seem to be but right that the County deriving the benefit should bear the burthen. A very ingenious argument was built upon the phraseology of the 7th sec. of the 90th ch. of the Revised Statutes, which is taken from the 2nd section of the act of 1808, above cited. It was, according to that act, to show that if the County of Anson was bound to pay anything, it was only the expense of removing the cause and transferring the prisoner; and that Richmond County ought to bear the expense of guarding her own jail, as it was her duty to provide one that did not need guarding. To this argument the first reply is, it no where appears that the guard was rendered necessary, by any defect in the jail. Nor is that the only ground upon which it may be ordered out. But another and a more sufficient one is to be found in the act itself. The provision is evidently made to meet the two cases, where the trial shall be had in the County possessing original jurisdiction, and the other, where it is acquired by removal. Read in this manner, *redendo singula singulis*, and the meaning is apparent. The act of 1810 was passed to remove any doubt, which might rest upon that of 1808, in this matter. We are of opinion that the County of Anson is bound to pay the expenses of the guard, while Martin was confined in the jail of Richmond County.

The point decided by his Honor is not so important, as it relates solely to the mode of proceeding. The decision on it seems to us to have proceeded on a wrong idea as to the nature of the case, as it was before the Court. It was treated as a mandamus, at the instance of several relators. It was in truth but a rule, and was so considered

in most respects by the parties. There was no writ, no return; but simply affidavits on both sides. Upon the rule, we suppose the Court could mould the writ or writs, so as to suit the case and give to each one of the relators his due. Indeed, we presume the Justices of Anson, when informed that their County is liable for the expenses of the guard, would much prefer the decision on that point in this form of one rule, rather than to be put to the expense of a separate mandamus for each of the guard. It is for that reason, the Court has decided the matter of right, so as to facilitate the disposition of the controversy on the case going back.

Judgment reversed, at the costs of the defendant. This opinion will be certified to the Superior Court of Anson County.

PER CURIAM. Ordered accordingly.

JOHN GREEN vs. ROBERT WILLIAMS.

A surety to an appeal by a party, who dies pending the suit, has no lien on his assets until after he has paid what, by the judgment, he was ascertained to be liable for as surety.

The case of *Miller* v. *Spencer*, 2 Murphy 281 and 2 Car. Law Rep. 281, cited and approved.

Appeal from the Superior Court of Law of Davidson County, at the Spring Term 1850, his Honor Judge CALDWELL presiding.

No counsel for the plaintiff.

Mendenhall, for the defendant.

Pearson, J. The plaintiff was the surety of one Harris, for an appeal from the judgment of a magistrate in favor of one Garner, upon a simple contract debt. After the appeal Harris died: and the defendant, his administrator, was made a party, and pleaded "fully administered." Pending this suit the defendant paid to one Sumney a simple contract debt of about $140 against his intestate. On the trial, the plaintiff, Garner, obtained a verdict for his debt, but the plea of "fully administered" was found in favor of the defendant, and Garner signed judgment for his debt, and proceeded by *sci. fa.* to subject the real estate. But failing to get his judgment satisfied, he moved for judgment "*nunc pro tunc*," which was entered against the plaintiff as surety for the appeal of the defendant's intestate; and the plaintiff was compelled to pay the balance due on the judgment. Whereupon he brought this suit; to which the defendant pleaded "no assets," and "fully administered." It was agreed, that if the payment to Sumney was a legal voucher as against the plaintiff's debt, then the defendant had fully administered. But if the payment to Sumney was not a legal voucher as against the plaintiff's debt, then the defendant had not fully administered and judgment was to be in the plaintiff's favor. The Court was of opinion with the defendant, and the plaintiff submitted to a non-suit.

We are not able to see any ground, upon which the plaintiff can object to the preference, which was given by the defendant to Sumney, by a voluntary payment of his debt, although made pending the proceedings by Garner; both were simple contract debts. The plaintiff can take no benefit from the act of 1829: which provides that a surety, who pays the debt, shall have the same priority against the assets, as the demand against his principal was entitled to, which in this case was that of a simple contract creditor.

Admit, that after the death of Harris, the defendant, as his administrator, being made a party to the suit, was at liberty to put in the plea of "fully administered," (which point we do not decide.) Admit also, that by a proper construction of the act of 1829, a surety paying the debt has a right to take the place of the creditor, and becomes entitled to all of his rights and priorities (a point which we do not decide,) in this case the creditor, Garner, was bound by the finding of the jury that the defendant had fully administered and so the plaintiff can take no benefit, if allowed to stand in his place.

It was urged by the plaintiff's counsel that, as he was bound as surety for the appeal, the obligation on his part ought to be ranked as a specialty debt, if not as a debt of record; and so had priority over and excluded all simple contract creditors. The obligation of the plaintiff was contingent and did not bind the assets. This is fully settled. 2 *Car. L. R.* 413. 2 *Williams on Ex'rs.* 672. 2 *Vernon* 101. *Miller* v. *Spencer*, 2 Murph. 281.

PER CURIAM. Judgment affirmed.

THE STATE TO THE USE OF WILLIAM BUTTS vs. MICHAEL BROWN.

The sureties on the official bond of the sheriff are not liable for a trespass committed by him under color of his office.

The case of the *State* v. *Long*, 8th Ired. 415, cited and approved.

Appeal from the Superior Court of Law of Forsythe County, at the Spring Term 1850, His Honor, Judge BATTLE, presiding.

This was an action of debt against the defendant, a surety on the official bond of R. W. Long, sheriff of the County of Rowan, for the year 1843. The breaches assigned were, that Richard W. Long, sheriff, in the month of October, 1843, under the 10th sec. 102nd ch. Rev. Stat. had improperly and illegally distrained, seized, and by public sale made out of cetiain property of the relator, to wit, segars, the sum of $202 37; and knowing that the said segars were not subject to taxation, appropriated the sum of $202 37 to his own individual purposes.

The relator claimed, first the value of the segars, and secondly, the sum for which they sold.

The witnesses for the plaintiff testified, that the segars were manufactured at Bethania, in the County of Forsythe and State of North Carolina; were conveyed to the town of Salisbury, in two wagons, for sale: That the sheriff was fully informed, that the said segars were manufactured as aforesaid in this State, but nevertheless claimed a pedlar's tax on each wagon of $100, for failing to show a license, which sums the relator refused to pay: That the sheriff thereupon proceeded to distrain, advertise and sell the said segars, agreeably to the provisions of the said 10th sec. 102nd ch. Rev. Stat. and by his sale raised the aforesaid sum of $202 37: That the said sale was forbidden by the relator: The plaintiff also showed by the certificate of the Comptroller, that the said R. W. Long, sheriff as aforesaid, had not paid any portion of the proceeds of said sale into the public treasury: The plaintiff also showed by the record, that he had sued and recovered of said sheriff, R. W. Long, the value of said segars, in a suit at law: and that under a *ca. sa.* issued in pursuance of the said judgment against the said Long, he had taken the oath of insolvency before the bringing of this suit.

All the aforesaid evidence was heard by agreement of parties, subject to the opinion of the Court upon the admissibility of the whole or any part thereof. The Court intimating an opinion, that the plaintiff could not recover, taking the whole testimony to be true, he submitted to a non-suit, and appealed to the Supreme Court.

Morehead, for the plaintiff.
Mendenhall, for the defendant.

NASH, J. We entirely concur with his Honor who tried the case below. And, while we confirm his judgment, must be permitted to express our own regret, that the obligations into which our ministerial officers enter upon taking office, are so insufficient to the security of the public. The defendant is sued as surety upon the official bond of Richard W. Long, as sheriff of Rowan County; and the only question submitted to us is, do the facts set forth in the case agreed amount to a breach.—We are constrained to say that they do not; and although we admit, that a gross and palpable act of violence and oppression has been perpetrated on the relator by the sheriff, we cannot say it is within the bond. The conditions of the sheriff's bond are prescribed by the Act of Assembly, Rev. Stat. ch. 109, sec. 13, and are as follows: "The condition of the above obligation is such, that, &c. —if therefore, the said ——— shall well and duly execute and make return of all process and precepts to him directed, and pay and satisfy all fees and sums of money, by him received or levied by virtue of any process, into the proper office, into which the same, by the tenor thereof, ought to be paid, or to the person or persons to whom the same shall be due, &c., and in all other things, well, truly, and faithfully execute *the said office* of sheriff, then," &c. It is under the last condition this action is brought. Was Richard W. Long executing the office of

sheriff in seizing the segars of the relator? Very clearly not. He was indeed professing to do what alone a sheriff can do; but what no sheriff has a right to do—committing a simple trespass. The Revenue Act of 1836, Rev. Stat. ch. 102, sec. 10, imposes a tax of $25 on every person, who shall peddle in any County of the State "any goods, wares, or merchandise, not of the growth of this State." The segars in question were manufactured in this State and of this the sheriff was fully informed, and he therefore knew they were not the subject of taxation. This was not executing the office of sheriff; it was violating it in a most flagrant manner, and perverting it to an instrument of wrong and violence. If he had been willing to execute his office truly and faithfully, he would have abstained from taking the property. We have not been able to find any case in which the sureties of a sheriff have been held responsible, for a trespass committed by their principal, and we have looked with much care. The books are full of cases, where sheriffs have under an execution against one man taken the goods of another; but in no instance have the sureties been held responsible. The latter are here sued upon an express contract, and their liability is confined to it and cannot be carried beyond its proper and fair meaning. The principles governing this case were fully discussed in the *State* v. *Long*, 8 Ired. 415. The Court then decided that the provision in the sheriff's bond we are now considering, "binds the officer affirmatively to the faithful execution of his office—there is no clause to cover the case of an abuse or usurpation of power—no negative words, that he will commit no wrong by color of his office, nor do anything not authorised by law." This fully and entirely meets this case.

We see no error committted by the Judge below in admitting the testimony, and agree with him that the plaintiff upon it cannot maintain his action.

PER CURIAM. Judgment affirmed.

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WILLIAM WALTERS *vs.* FLEETWOOD WALTERS.

In an action on a bond, where evidence was given that the bond was to be delivered up, when the obligor paid the costs of a certain suit; *Held*, that this evidence was inadmissible to show that the bond was a conditional one, but that it was proper to show that, by the agreement of the parties, the bond was to be paid in whole or in part by the payment of the costs of the suit, and, therefore, the obligor, if he paid the costs, was entitled to a credit on the bond, *pro tanto*.

Appeal from the Superior Court of Law of Robeson County, at the Fall Term 1849, his Honor, Judge Dick, presiding.

The defendant gave to the plaintiff his bond for fifty dollars, dated March 24th, 1846, and payable on or before July 24th, 1846, and this suit was brought thereon by way of warrant. Pleas, *non est factum*, payment, and accord and satisfaction. On the trial the defendant offered evidence, that, prior to the execution of the bond, a suit was pending between the parties, which they agreed to compromise, and, as a part of the compromise, that the defendant undertook and promised the plaintiff to pay certain costs incurred in that suit, and that the bond was given as a security for those costs and upon an express agreement, at the time of the execution of the bond, that, upon the payment of the costs by the defendant, the plaintiff should deliver up the bond to the defendant. The plaintiff objected to the evidence, but the Court admitted it; and the defendant then gave further evidence, that before this said suit was brought, (which was on the 15th of October, 1847,) the defendant paid the said costs to the

Clerk of the Court, in which the suit had pended. Thereupon the Court gave an opinion, that, supposing the evidence to be true, the plaintiff could not recover; and the plaintiff submitted to a non-suit and appealed.

Mullins, for the plaintiff.
Dobbin and Winslow, for the defendant.

Ruffin, C. J. As the amount of the costs, which the defendant agreed to pay and did pay, is not stated, and the opinion of the Court was given against the plaintiff without any reference to the amount, it must be understood, that the opinion rested exclusively upon the agreement, that the bond should be void or be delivered up, if or when the defendant should pay the costs, whether more or less, and upon the fact, that he had paid them. That is clearly erroneous; for, it is, plainly, nothing less than annexing, upon parol evidence, a condition to a bond, which is absolute upon its face. If the agreement had been, that the plaintiff would accept a deed from the defendant for a tract of land, or any other collateral matter, in satisfaction of the money for which the bond was given, and the thing had been done and accepted accordingly, it is true the defendant would have been discharged, as there would then be an actual subsequent satisfaction, and it would be immaterial when the plaintiff first agreed that he would accept such satisfaction. But in the present case the alleged agreement is, that the plaintiff would accept a less sum of money, whenever paid, in discharge of a bond for a larger sum: which is a thing that cannot be, unless the larger sum be regarded in the light of a penalty, to be saved on the condition of paying the smaller; and it is against fundamental principle to admit parol evidence to establish such a condition, in opposition to the tenor of the bond. If, indeed, the defendant paid the costs in question or any part of

them, we should hold the amount thus paid to be a payment, *pro tanto*, upon the bond sued on; for, if a creditor by bond request the obligor to pay a sum of money to a particular person and agree that such payment shall be allowed as a payment of so much of the obligation, there is no doubt that it may accordingly be treated as a payment or satisfaction to that extent. And it can make no difference whether the request be at or after the execution of the obligation; since, if the former, it is a continuing request, and, until countermanded, authorises the debtor, in confidence thereof, to make the payment to a third person. Therefore, the defendant was entitled to credit on the bond for what he paid to the Clerk under the agreement. But that was all he was entitled to, and he could not ask for a verdict, that he had paid or satisfied the whole sum mentioned in the bond, by having paid a less sum to or for the plaintiff—since that, in law, is not such payment or satisfaction.

Per Curiam Judgment reversed and *venire de novo*.

EDWARD H. MEADOWS *vs.* MARY MEADOWS.

In order to constitute an advancement of a slave by parol gift, there must be an actual delivery and change of possession.

While a son continues to reside with his father the gift has no operation, but when he removes and takes the slave with him, the advancement becomes effectual and its value must be estimated at that period.

A child does not lose the benefit of an advancement of a slave by selling it.

Advancements are understood to be gifts of money or personal property for the preferment and settling of a child in life, and not such as are mere presents of small value or such as are required for the maintenance or education of the child.

The cases of *Stallings* v. *Stallings*, 1 Dev. Eq. 298, *Hinton* v. *Hinton*, 1 Dev. & Bat. Eq. 387, *Adams* v. *Hayes*, 2 Ired. 361, and *Cowan* v. *Tucker* 5 Ired. 78, and 8 Ire. 426, cited and approved.

Appeal from the Superior Court of Law of Craven County, at the Spring Term 1850, his Honor Judge BAILEY presiding.

Edward Meadows died intestate in 1846, and the present suit was instituted by petition by some of his children against the administratrix and widow and other children for distribution of his estate. A question was made at the hearing, whether one of the children, John A. Meadows, was fully advanced, or not; and as to that the parties argued on the following facts: Edward Meadows was a mechanic, and worked at his trade. When this son John A. was about ten years old, the father purchased a negro boy, and declared he intended him for his said son, and from that time forth the negro was called the son's in the family. The son was then living with his father, and when he became large enough, he worked with

his father at his trade. After he became eighteen years old, the father allowed the son to take the earnings of the negro until he married; and when he married, he removed to himself, and carried the negro with him and kept him in his possession, using him as his own, until, in July 1841, for some fault, he sold the boy for $700; and the father assented to the sale. On the part of the son, it was insisted, that the gift was made as soon as the father purchased the slave, and that the negro should be valued as of that period, or, at the latest, when he had the boy's earnings: while the other children insist, that the son was chargeable with the price, $700, and also with the various sums made and received by him, as earnings of the boy, after the son was eighteen. The Court held the son to be chargeable with the price he got for the negro, that is, the $700; and each side appealed.

J. H. Bryan and J. W. Bryan, for the plaintiffs.

No counsel for the defendants.

Ruffin, C. J. The opinion of the Court is clear, that there was no such possession of the son, while he continued to live with his father, as could constitute a good gift of the slave, as an advancement under the statute. An actual delivery and visible change of possession are indispensable to constitute a valid parol gift. This point was so fully investigated in *Adams* v. *Hayes*, 2 Ire. 361, that it is only requisite to refer to that case as settling it. The Court holds, however, that the gift of the negro became complete, for the purposes of the question before us, when the son left the father and actually took the negro with him. That was a visible change of possession upon an actual, though imperfect, gift by the father; and the negro would, unquestionably, have been an advancement, as of that period, under the proviso in the act of 1806, had the son not sold the negro, but retained him in

his own possession, until the death of the father intestate. *Stallings* v. *Stallings*, 1 Dev. Eq. 208; *Hinton* v. *Hinton*, 1 Dev. & Bat. Eq. 587. It seems to the Court, that to this purpose the possession of the son's alienee is that of the son himself. The substance of the proviso is, that when a gift of a slave is made by a parent, either expressly or by implication, and the parent actually parts from the possession to the child and never again takes it, but dies without otherwise disposing of the property by any act *inter vivos*, or by making a will, the gift thereby becomes complete *ab initio*, so as to amount to an advancement from that period. That is the effect of what was said upon the construction of the act in the cases just cited and in that of *Cowan* v. *Tucker*, 5 Ire. 78, and 8 Ire. 426; in which the Judges use the expression, that the parent died "without having resumed the possession," and the like, as equivalent to that in the statute of the slave's "remaining in the possession" of the child. Several cases may readily be put, which show that such must be the sense of the act. Suppose, for example, that a parent gives six slaves to a child by parol: if they all live and remain with the child until the parent die intestate, the case is within the words of the act, and the slaves constitute an advancement from the time of the gift, and the issue of the slaves are deemed to have been the child's. But, if one of the six die before the parent, could it be doubted, that the child would, nevertheless, have to account for that one as a part of his advancement? Plainly, he ought; for the gift was of the whole at once, as one advancement, and the child could not keep the other five and their increase, at the original value of the five, and throw the loss of the death of one on the parent. Nay, suppose such a gift of a young female slave, who afterwards has a numerous progeny and dies before the donor: the accident of such death can not alter the right to the issue, nor change the period to which the advancement is to be re-

ferred. For, if she had lived longer than the donor, she would have been, alone, the advancement, and no notice would be taken of the children, which would be regarded as belonging to the child as they came *in esse*, as incident to the child's title to the mother. Surely the legislature could not mean, that the death of the woman should make her cease to be an advancement, and, further, convert the issue into several substantive advancements. At what periods would they be advancements? They were never "put by the parent into the possession of the child;" and the child would not have a title to them at all, or would derive it through that to the mother, and, consequently, the mother was the subject of the advancement, though dead at the period when the child's title first became irrevocable and complete. Again, if the child die before the parent and the slaves be taken by the child's executor or administrator, and applied in a course of administration, or held as a part of the estate until the parent's death, it seems plain that the slave would still be an advancement to the child as of the time of the original gift; for, the case would not be within the mischiefs against which the act is directed, and if the gift were not effectual, the unquestionable purpose of the parent, and expectation of the son and his creditors and family, would be defeated. So, if there be grand-father, father, and son, and the grand-father make a parol gift to the father of slaves, and the father makes a like gift to his son of some of the slaves, and then dies intestate. Now, in such a case, it may be admitted, that the grand-father could annul his gift and take back the negroes: yet, if he did not, it could not have been the intention of the legislature, that his gift should be annulled, as a matter of law simply, since it is plain, that, as between the father and his son, the portion given to the son was an advancement, and the very purpose of the grand-father in making his gift originally was to enable his son to pro-

vide for his family. The possession of the grand-son in such a case must be deemed that of his father, being under him, within the meaning of the legislature. Again, if the fact of the possession not remaining with the child at the death of the parent, by reason of the prior death of the slave, were to defeat the operation of the proviso, it would produce manifest and gross injustice in many cases; as, for example, by making the child account for hires or profits while he had the possession, though the parties contemplated no such thing. The case of a sale by the child, not invalidated by an objection of the parent, stands upon the same reason with the cases just put.—The possession of the vendee is the same as that of his vendor, and, instead of impeaching, completes the advancement. This sale is called that of the son, since the case is understood so to mean. It might be very different if the son did not profess to own the slave and not to sell him as his, but only under the authority of the father, and to ask for the assent of the father as necessary to the validity of the sale. Then, indeed, it would be substantially the sale of the father, and his gift, that of the money, and not of the slave. But here the sale is stated to be that of the son, and, of course, as upon his own title; and the assent of the father is to be understood as rather evidence of his approbation of the son's sale, and not importing that he, the father, made it or joined in it. The Court therefore holds, that, in this case, the advancement is to be estimated, as of the day the negro was exclusively in his son's possession: that is, when he left his father's and took the negro with him; which may be more or less than the price of $700, subsequently received for him—for the case agreed does not state the length of time between those events, nor the value at the former one. Of course, the son is not liable for hires or profits after he had such exclusive possession, as the negro is then taken to be his. Whether the sums given him by his father,

while living with him, are advancements or not, the case does not furnish facts to enable the Court to say. For, it does not appear, what was the amount of those sums, nor for what purpose they were given. It may be possible they were advancements; though it is not very probable, we conjecture. Small sums of money given by a father to a son in his minority, who is living with him, to supply him with clothing or to defray the expenses of the ordinary pleasures and amusements of youth in their rank of life, are not deemed advancements; and the rule would not be varied by the circumstance, that the father derived the money from any particular source. We suppose it most probable that such was the nature of this case; and, if so, the opinion of the Court would be that sums given for such purposes, though spoken of as the profits of the negro, would not be advancements; for, advancements are understood to be gifts of money or personal property for the preferment and settling of a child in life, and not such as are mere presents of small value or such as are required for the maintenance or education of the child, which the law throws on a father, at all events. Not knowing the facts, however, with precision, the Court cannot determine that point definitely. The decree must therefore be reversed—each party paying their costs in this Court; and the cause must be remanded and this opinion certified to the Superior Court, in order that the decree may be there varied accordingly, and farther proceedings taken in the case.

Per Curiam. Ordered accordingly.

THE STATE ON THE RELATION OF ISRAEL FANSHAW *vs.* WILLIAM JONES & AL.

An infant mulatto child was found at the door of a gentleman, who took charge of it, and it remained in his possession for more than seven years, he professing that he did not claim her as a slave, but believed she was free, and refused to deliver her to any person, who could not show a good title to her as a slave At his death, he left her two hundred dollars.—*Held, first*, that, if she was free, of course the next of kin could not claim distribution of her or of the legacy; *secondly*, if she was a slave, the next of kin were entitled to distribution of the legacy, and also of the girl herself, if he had her three years or more in adverse possession; and that, to vest the title of the slave in him, by virtue of the statute, it was not necessary that he should have claimed her as a slave.

Appeal from the Superior Court of Law of Currituck County, at the Spring Term 1849, His Honor, Judge Manly, presiding.

This is an action of debt on the bond, given by Jones, as the administrator of the will annexed by Henry Britt deceased. Pleas, conditions performed, and no breach. The relator is the administrator of the testator's widow, who dissented from her husband's will. The breach assigned is, in not distributing a negro slave named Mary Ann and the sum of $200, left by the testator and not effectually disposed of in his will. It was admitted at the trial, that, if entitled at all, the relator was entitled to one third of the negro and money, and that, before suit brought, he demanded the same of the defendant Jones, who denied the relator's right to any part of the fund. In the will there is the following clause: "The girl Mary Ann, which was picked up or found at my door, is to re-

main with my wife Polly, until she arrives at the age of twenty-one; and then it is my will, that she be and enjoy all the benefits of a free person of color. I also give and bequeath to the said Polly the sum of two hundred dollars."

For the purpose of showing that the girl Mary Ann was the slave of the testator, the relator gave evidence to the following effect: The testator resided in Currituck County, and, about the year 1829, one Wilson, who resided in the same County, sold to one Willis a female slave, named Milly, who was pregnant. Willis resided in Caswell County and was a negro-trader. The woman ran-away from Willis in Currituck, and in some short time afterwards she came to the house of a widow lady, who lived in Currituck, and a short distance from Britt's, bringing with her a female infant, perfectly naked and apparently not more than a day old. The lady told the woman, that she and her child would die if they continued in that condition, exposed in the woods, and advised her to go to her owner. The woman went away, and, in two or three days afterwards, a mulatto female infant was found at the door of Britt's house, who is the girl Mary Ann. But the lady did not see the infant in any short time, and therefore did not know her to be the same, which the woman Milly brought to her house; but evidence was given that the girl Mary Ann is a bright mulatto and bears a family resemblance to the said Milly. Britt and his wife had no children, and took the found child into the house with them, brought her up tenderly, and became much attached to her. About four years afterwards, Willis returned to Currituck and claimed Mary Ann, as the child of his woman Milly and his slave, and demanded her from Britt. But the latter refused to give her up, saying that neither Willis nor any other person should have her without establishing a title to her by law; for that he, Britt, did not claim her as a slave, and

believed that she was not, but that she was the offspring of a white woman and a colored man. Britt frequently made similar declarations until he made his will and died, which was in 1836. Since that time the girl Mary Ann has lived with the defendant, Jones, but he did not claim her as a part of Britt's estate, nor as the property of any person.

Upon the foregoing evidence the Court instructed the jury, that their first enquiry should be, whether the girl Mary Ann was born a slave or not, which depended upon the fact, whether she was the child of a free woman or of a slave. If they should find that her mother was free, then their verdict should be for the defendants. But, if they should be of opinion, that she was the child of the woman Milly or of any other slave mother, so as thereby to be, herself, a slave, the next enquiry was, whether she was the slave of the testator Britt. And upon that point the Court proceeded to say, that the possession of Britt, as stated, was insufficient to vest the property in him, unless during the time he claimed a property in her; for, to have that effect, his possession must not only have been maintained for three years against all other persons, but must also have been maintained with a view to his own benefit; and, therefore, if the jury should be of opinion, that Britt did not claim Mary Ann as his slave, then also the verdict should be for the defendants. From a verdict and judgment against him the relator appealed.

Heath, for the plaintiff.

Jordan, for the defendants.

Ruffin, C. J. The directions were certainly right, if the jury believed the foundling to be the child of a free mother. But on the supposition, that her mother was a slave, the directions were clearly wrong, at least, as to the money claimed by the relator; for, whether the donee

of the money was a slave of the testator, or of Willis, or of another person, she was equally incapable of taking under a bequest, and the $200, therefore, resulted to those entitled to the surplus of the estate. The Court, however, holds, that the whole of that part of the instruction was erroneous, if in fact the child was a slave. For, the possession of Britt, and of the defendant, since Britt's death, was, undoubtedly, adverse to Willis, to whom the testator refused to deliver the child upon demand. Indeed, the instruction supposes the possession of Britt to "have been maintained against all other persons;" in other words, to have been adverse to all the world, who claimed the girl as a slave; and, yet, it was laid down further, that such a possession did not vest the title of the slave in the possession, if he believed her to be free and did not keep the possession with a view to his own benefit. The Court cannot adopt that opinion. For, the possession for more than three years bars the action of the owner under the act of 1715: and then the act of 1830, Rev. Stat. ch. 65, sec. 18, is, that the person, so in possession, and those claiming under him, shall be deemed to have a good and absolute title to the slave, as against all persons so barred by the statute of limitations.— When the owner is thus barred and loses his action and title, the negro must necessarily belong to the possessor; the *status* of the slave is not changed, but continues, and as a slave must belong to some one, and as no one can recover from the possessor, such slave must be deemed in law, the absolute property of the possessor. So the rule was laid down in the case of *White* v. *White*, 1 Dev. and Bat. 260, and it governs the present case.

PER CURIAM. Judgment reversed and *venire de novo*.

JOHN L. FAIRLY *vs.* MARGARET McLEAN.

The interest in a bond payable to A., or to A. or order, can only be transferred at law by indorsement.

Appeal from the Superior Court of Law of Richmond County, at the Spring Term 1850, his Honor Judge SETTLE presiding.

Banks, for the plaintiff.

Winston, for the defendant.

PEARSON, J. This is trover for three single bonds. The plaintiff's intestate owned the bonds. One was payable to him or *bearer*; the others were payable to him. The intestate delivered the bonds to his son, John McLean, saying, "I give these to you and your children forever." The son died soon after his father, having the bonds in his possession, and the defendant, who is his widow, took them into her possession and converted them.

His Honor charged that the gift was perfected by the delivery: The right thereby vested in the son, and the plaintiff could not recover. To this part of the charge the plaintiff excepts. We think the exception well founded, as to the bonds payable to the plaintiff's intestate. The plaintiff yields the question, as to the bond payable to his intestate or bearer.

By the act of 1786, the bonds payable to the plaintiff's intestate are considered as if payable to him *or order*: and it is provided that all such bonds shall be negotiable; and all interest and *property* therein shall be transferable by endorsement in the same manner as promisso-

ry notes; and, by the act of 1762, promissory notes are made assignable in the same manner as inland bills of exchange are by the custom of merchants in England; and inland bills of exchange payable to *order*, are, by the law-merchant, assignable by endorsement and delivery. *Baily on Bills* 98.

The result is, that the two bonds in controversy were negotiable by endorsement and delivery. In that way, and in that way only, can the right of property be transferred. Both acts must concur. An endorsement, without a delivery will not effect the transfer. *Nelson* v. *Nelson*, 6 Ired. Eq. 409. And for the same reasons the tranfer is not perfected by delivery without endorsement.

At common law, a note or bond was not considered property. It was not the subject of larceny. It could not be seized upon a *fieri facias*—nor could it be transferred in any way. It was a mere "chose in action," an ideal thing—giving certain right to the owner—and although Courts of Equity, from an early period, have given protection to persons, who, for valuable consideration, purchased this ideal thing, or right to have money, Courts of law have never recognised a third person as being the owner, unless the interest and property therein have been transferred in the manner prescribed by the statute.

It is said, that by allowing the action of trover to be brought for the conversion of notes and bonds, the Courts recognise them as property. That is true to a certain extent: but, although recognised as property, *non constat*, that bonds and notes may be transferred in any other than the mode prescribed by law. Slaves are property; but slaves can only be transferred by gift in the manner prescribed by law.

There must be a *venire de novo*.

Per Curiam. Judgment reversed and *venire de novo*.

THE STATE ON THE RELATION OF P. W. SPENCER *vs* R. M. G. MOORE & AL.

It seems that the presumption of the death of an individual, arising from his absence from his domicil for seven years, does not imply that he died at the end of the seven years, but that he died either then or at some other period during the seven years.

The next of kin cannot support an action on an administration bond for their distributive shares, because this implies that the estate has not been administered, and the action should be by an administrator *de bonis non*.

The case of the *State* v. *Johnson*, 8 Ire. 381, 397, cited and approved.

Appeal from the Superior Court of Law of Hyde County, at the Spring Term 1850, his Honor Judge BAILEY presiding.

Samuel Spencer died intestate in Hyde County, in May 1840, and in November following administration of his estate was granted to Thomas B. Gibbs, who entered into the usual bond, for $2500, with the defendants as his sureties. The intestate left no issue, and Gibbs married his aunt and claimed to be entitled in her right, as sole next of kin, to the personal estate. He sold the effects and got in the money, to the amount of $829 09, which he applied to his own use, and then he died insolvent, in April 1848. John Spencer, a brother of the intestate Samuel, formerly resided also in Hyde County, and left it on the 1st May 1841, saying, he was going to some distant Western State, and he has not since been heard of; and in May, 1848, administration of the estate of the said John was granted to the relator, as upon a death and intestacy; and in August 1848 this action was brought on the administration bond, alleging the breach to be in fail-

ing to pay the said sum to the relator, as the administrator of said John, the surviving brother and sole next of kin of the intestate Samuel. The pleas were conditions performed and no breach.

Upon those facts the Court was of opinion, that the plaintiff could not maintain the action, and ordered a nonsuit; and the relator appealed.

Shaw, for the plaintiff.

W. H. Haywood and *Donnell*, for the defendants.

RUFFIN, C. J. To constitute the relator's intestate Samuel's next of kin, it is necessary that John should have survived his brother: as to which point, the only evidence is, that, at the time of Samuel's death, seven years had not elapsed from John's departure from this State, though that period has now elapsed, and had, when administration was granted to the relator. It is thence inferred, that John Spencer is now dead; but that he was not dead at his brother's death in 1846. The rule, as to the presumption of death, is, that it arises from the absence of the person from his domicil without being heard of for seven years. But it seems rather to be the current of the authorities, that the presumption is only, that the person is then dead, namely, at the end of seven years; but that the presumption does not extend to the death having occurred at the end or any other particular time within that period, and leaves it to be judged of, as a question of fact, according to the circumstances, which may tend to satisfy the mind, that it was at an earlier or later day. *Doe* v. *Nepeau*, 5 Barn. & Ad. 86. 1 *Greenleaf Ev sec.* 41. The authorities, however, are not uniform upon the point. *Smith* v. *Knowlton*, 11 New Hamp. Rep. 191. However the rule may be on that subject, it is not necessary that the Court should take the trouble of investigating, because, at all events, the relator, as the repre-

sentative of the next of kin, cannot have an action on the administration bond. By the very act of bringing the suit the relator affirms, that the first administrator had not administered the estate. Therefore, the right to call him to account and to put the bond in suit is vested in the administrator *de bonis non*, as the Court has already held during this term, in *The State, on the relation of Williams* v. *Britton's adm'r.*, upon the authority of the previous case of *The State* v. *Johnston*, 8 Ire. 381, 397.

PER CURIAM. Judgment affirmed.

JOHN LAMBERT vs. JOAB LAMBERT.

Where a party offered in evidence the copy of a deed, for the purpose of showing the receipt of money, and it appeared that the deed had not been proved nor acknowledged by the supposed bargainor, but notice had been given to produce the original. *Held*, that the copy was not admissible for any purpose, as the original would not be, until property proved.

Appeal from the Superior Court of Law of Randolph County, at the Spring Term 1850, his Honor, Judge BATTLE, presiding.

This was an action of assumpsit for money paid by the plaintiff, as defendant's surety.

On the part of the plaintiff it was proved, that the defendant was indebted to Abel Cox and several other persons, and being about to leave the State, and not being able at the time to pay the debts, an arrangement was made between him and his son, John R. Lambert, and the plaintiff, that the said John R. and the plaintiff should as-

sume his debts, or should become security for them, upon his conveying to them a certain tract of land and certain articles of personal property to be applied to the payment of them. The defendant therefore executed to the plaintiff and John R. Lambert, absolute deeds for two tracts of land, and made a verbal assignment of the personal property, and they took up and cancelled the notes held by the defendant's creditors, and gave their own notes for the debts, which the plaintiff subsequently paid, the other surety, John R. Lambert, having become insolvent.

The defendant insisted, that the agreement between him and the plaintiff and John R. Lambert, was, that the two latter were to pay the debts of the defendant upon his conveying to them his land and other property; and consequently, the notes which they gave to the defendant's creditors, were given as their own in discharge of the defendant's liability—and that when they were paid by the plaintiff, it was a payment of his own debts and not as surety for the defendant. He gave in evidence a letter. The defendant contended further, that if this were not the true agreement between the parties, but his property was conveyed to the plaintiff and John R. Lambert as collateral security only, that then the plaintiff and John R. Lambert had sold this land and the plaintiff had received more than enough to pay the amount of the debt, which he now seeks to recover. And to prove this, he offered in evidence a copy of a deed for the land, alleged to have been executed by the plaintiff and John R. Lambert to John Lambert, Sen., the father of both the plaintiff and defendant. This was objected to, because the original was not produced, and because, though it had been acknowledged by John R. Lambert and registered, it had never been proved or acknowledged as the deed of the plaintiff, and consequently had not been registered as to him. The defendant then showed a notice to the plaintiff to produce the original: that John Lambert, Sen.,

was dead: and that the plaintiff and another were his executors: and that at the time of his death, the testator had property amply sufficient to pay $400, the consideration recited in the deed. He then stated that the deed was offered only for the purpose of showing an acknowledgment by the plaintiff, that he had received the amount or at least half of the amount of the consideration money recited in the deed, and for this purpose and this alone it was received by the Court. It was then proved, that John R. Lambert had received $50 only of the purchase money, and it appeared that the proceeds of the personal property had been applied to the payment of debts not claimed in this action.

The Court instructed the jury, that if they inferred from the letter offered in evidence by the defendant, that the agreement between the parties was as the defendant first contended, then the plaintiff could not recover; but, if they found that the land and other property were conveyed to the plaintiff and John R. Lambert as collateral security, then the plaintiff was entitled to recover; unless they were satisfied by the evidence, that he had actually received from the proceeds of the land sufficient to pay the amount now claimed by him.

The jury returned a verdict for the defendant; and the plaintiff moved for a new trial, because the presiding Judge had left the construction of the letter to the jury, instead of deciding upon its meaning himself; and because of the admission of improper testimony, in suffering the defendant to read the deed from the plaintiff and John R. Lambert to John Lambert, Sen., for any purpose.—The Court thought there was nothing in either of these objections, of which the plaintiff had a right to complain, and therefore refused the motion for a new trial and gave a judgment for the defendant, from which the plaintiff appealed.

Mendenhall, for the plaintiff.
W. H. Haywood, for the defendant.

NASH, J. The plaintiff asks for a *venire de novo* on two grounds. The first, for error in the Judge in submitting to the jury the construction of the letter, which was given in evidence by the defendant. The second, for error in suffering the defendant to read to the jury the copy of the deed from John and John R. Lambert to John Lambert, Sen. for any purpose. In the argument here, the first ground has been properly abandoned. The instrument is so worded, that the Judge committed no error in law in submitting the construction to the jury. In admitting the paper purporting to be the copy of a deed of conveyance from the plaintiff and John R. Lambert, there was error.

The deed had been proved and registered as to John R. Lambert, but not as to the plaintiff. His Honor rejected it as evidence of a conveyance of the title of the land, but upon notice to the plaintiff to produce the original, admitted it as evidence of a receipt of the money or a portion of it, for which it was said the land sold.—But as far as the case discloses the fact, there was no evidence whatever, that the plaintiff had executed the paper, of which the one offered in evidence was alleged to be a copy. The supposed original therefore would not have been evidence against him. Upon what rule of evidence could the copy be? The sole question presented to us at this time, being the competence of this evidence, our view of the case is confined to it. And being of opinion that it was erroneously admitted, the judgment must be reversed and a *venire de novo* ordered.

PER CURIAM Judgment reversed and *venire de novo*

DICKSON, MALLORY & CO. vs. PLEASANTS JORDAN & AL.

No warranty of quality is *implied* in the sale of goods.

If a vendor sells articles, apparently of the kind ordered by the vendee, though the vendee has no opportunity of testing the quality, until after he has used them, yet, if there be no fraud on the part of the vendor, the purchaser must bear the loss, if it turns out that there is a defect in the articles.

Appeal from the Superior Court of Law of Hertford County, at the Spring Term 1850, his Honor Judge ELLIS presiding.

Smith, for the plaintiffs.

Bragg, for the defendants.

PEARSON, J. This was assumpsit. The declaration contained two counts; one on a special contract, the other for goods sold and delivered.

The defendants, who were the owners of a fishery, applied to the plaintiffs, who were merchants, at their store in Norfolk, for ten rolls of "seine rope," and informed them that it was to be used at their fishery. The plaintiffs did not have the article on hand, but engaged to procure it and send it to the defendants, at the price of 13¾ cts. per pound, and which was accordingly done.

The rope sent was new and of the size and kind known as "seine rope." The defendants used it, but it proved to be of inferior quality, and repeatedly broke in drawing the seine, and was unfit for fishing purposes. The Court instructed the jury, that if the plaintiffs knew the pur-

pose for which the rope was intended, and it was not present at the time of the sale, so that the defendants had no opportunity to judge of its quality, the law implied a warranty, that it should be reasonably fit for the purpose of fishing:

That, if the defendants, when the rope was sent, could by examination, have detected its bad quality and unfitness, their reception of it was a waive of the warranty. But if its bad quality and unfitness could not be detected except by actual trial, and using it in the fishing operations, the reception of it was not a waive of the warranty; and if the jury were satisfied that it was in fact of bad quality and unfit for fishing purposes, they ought to make a reasonable deduction from the price. The jury made a deduction, and the plaintiffs except, for error in the charge.

It is a principle of the common law, that no warranty of quality is implied in the sale of goods. "*Caveat emptor.*" In the absence of fraud, if the article proves to be of bad quality, the purchaser has no redress, unless he has taken the precaution to require a warranty. This rule is founded in wisdom; and its practical good sense is so well fitted to the habits of our trading people, that we are disposed to adhere to it. We believe it is adopted in almost all of the States of the Union, where the common law prevails.

The law protects against fraud, and the vendor is held liable, if he *knows* of the defect. If he is innocent, the purchaser must protect himself by a warranty. And it is supposed, that, in general, trade is sufficiently protected, in the absence of fraud, by the inducement which is held out to all dealers, to take proper care in the selection of their merchandise, arising from the fact, that by selling articles of good quality, they secure customers, and by selling those of bad quality, their customers desert them. Merchants buy upon their own judgment; they sell upon

the judgment of their customers, and only undertake for good faith and fair dealing. If a warranty was implied of the good quality of every article sold, there would be but few merchants, or prices would be exorbitantly high.

His Honor was of opinion, that, in this case, there were two facts, which furnished a sufficient ground for making an exception to the general rule. The plaintiffs knew the purpose for which the rope was intended, and it was not present to be judged of by the defendants. One or both of these facts might have been a very sufficient reason for requiring a warranty, and then it is to be presumed an advance in the price would have been insisted on. But we do not see how they can furnish a ground for the law to imply a warranty in favor of the defendants, when they neglected to take one for themselves.

The purpose, for which an article is intended, is known in almost every case, and the accident that it happens to be expressed, unless it *enters into and forms a part of the bargain*, can make no difference. One buys a set of harness, for instance. Can it make any difference, if he happens to say that his purpose is to use them for his carriage? The purpose is known, whether he says so or not, and the *price* is the same. Where, then, is the consideration to support this implied warranty; what does he *pay for it?* The case would be different, if he should tell the merchant, that his carriage was particularly heavy, or his horses unruly, and he was willing to pay a higher price to have the article warranted to be strong and fit for his purpose. So, if two men buy seine rope; one says nothing about his purpose; the other most unnecessarily says, he intends it for his fishery; both pay the same price, and the rope turns out to be of bad quality; upon what principle can the one insist on a reduction, while the other is obliged to pay the price agreed on?

But the rope was not present and the defendants had no opportunity, at the time they engaged it, to judge of

its quality. If the bad quality could not have been detected by an examination, and it was necessary to put it in use, before its unfitness could be discovered, what did the defendants lose by not having a chance to inspect it? They saw it when it was sent, which answered the same purpose, as if they had seen it when it was bought. One inspects for himself; another sends an order—both pay the same price—the rope upon trial, is found to be unfit—can there be any difference, and from what can the law imply a warranty in the one case and not in the other?

His Honor was of opinion, that if the bad quality could have been detected by examination, the defendants, by receiving it, impliedly waived the implied warranty.—We do not clearly apprehend the meaning of this part of the charge, unless it be, that if the defect was obvious, the defendants could not, in such case, complain of being cheated, for their means of information were the same as that of the plaintiffs', and a man can not be cheated, who acts with his eyes open and knows of the defect, before the contract is executed. In this we concur.

The only difference it can make, when the purchaser sees the article and when he sends an order, or has not an opportunity to see it, is, that in the former case he; judges for himself in the latter he constitutes the vendor, his agent, to select for him, and from the confidence reposed has a right to expect that the vendor will give him the aid of his judgment. But this does not furnish ground to imply a warranty; there is no consideration for that. It only gives him a right to a fair exercise of the vendor's judgment in place of his own, and he has no cause of complaint, unless there be fraud, from which the law equally protects in both cases.

The decisions, in which an exception is made, when the vendor is the manufacturer of the article, have no ap

plication to the present case, and we do not enter upon the enquiry, how far the exception is well founded.

There was error in the charge. There must be a *venire de novo.*

PER CURIAM. Judgment reversed and *venire de novo.*

TILMAN FARROW vs. ISAIAH RESPESS.

On the guaranty of a note, the guarantee is not bound to show that he has made a demand on the maker, but the guarantor is only discharged, when it appears that he has suffered loss in consequence of the guarantee's not using due diligence.

The cases of *Shewell* v. *Knox*, 1 Dev. 404, and *Ashford* v. *Robinson*, 8 Ired. 114, cited and approved.

Appeal from the Superior Court of Law of Beaufort County, at the Special Term in January 1850, his Honor Judge BATTLE, presiding.

This was an action of assumpsit upon the guaranty of a note, a copy of which, marked A., is sent as a part of this case.

For the plaintiff it was proved, that the note was given by the guarantor, in payment for the purchase of a share in a vessel.

At the time when the note became due, on the 1st day of October, 1846, the maker had a store in the town of Bath and had $2 or 3000 worth of property in possession, and was then supposed to be solvent; but on the 6th day of January following, he executed a deed in trust, and

the effects therein conveyed did not pay his debts by $5 or 6000. In February or March afterwards he died totally insolvent, and no administration has been taken on his estate. It was proved, that up to the time when he executed this deed of trust, he was punctual in paying demands upon him, borrowing money to meet such demands rather than be sued or warranted upon them; and that, as late as the latter part of December 1846, he borrowed $400 from the bank by the aid of his father, who was a man of property. No evidence was offered of any demand having been made of Topping, the maker of the note, nor was it shown that any was made upon the defendant as guarantor, until a few days before the bringing of the action. This demand was made by Havens, to whose use this suit is brought, who has always resided in Washington, twenty miles from Bath.

The plaintiff's counsel contended, that, by the special terms of the guaranty, the defendant was bound absolutely and in all events to pay the note; but that, if that were not so, he was bound, unless it appeared that the money might have been collected from the maker, by the use of reasonable diligence. The defendant's counsel contended, that the plaintiff could not recover, for the want of a demand on the maker of the note; and also of a failure to use due diligence in endeavoring to collect the money from the maker: and that the question of diligence was a question of law, to be decided by the Court.

The Court held, and so instructed the jury, that the defendant was not bound absolutely and in all events, as if he was a surety to the note; nor was he discharged by the plaintiff's failing to show a demand upon the guarantor under the circumstances of this case: that the true enquiry was, whether the defendant had sustained any damage by the plaintiff's failing to use due diligence in endeavoring to collect the note from the maker, that is, such diligence as a man of ordinary prudence would use

in collecting his own claim: that if they believed that the plaintiff could not have collected the money from the maker, by the use of such diligence, then they ought to find a verdict for him; otherwise, for the defendant. The plaintiff had a verdict and judgment, and the defendant appealed.

(A.)

$307 70. WASHINGTON, N. C., April 1st, 1846.

Six months after date I promise to pay W. H. Willard or bearer, three hundred and seven dollars and seventy cents, for value received, as witness my hand and seal.

L. J. TOPPING, [SEAL.]

Upon the back of which note this endorsement appears: "I hereby guarantee the payment of the within note to Tilman Farrow."

ISAIAH RESPESS.

April 26th, 1846.

No counsel *on either side.*

NASH, J. On the part of the defendant it is objected, that the plaintiff cannot maintain the action, for the want of a demand on the maker of the note, the subject of the guaranty; and also because of a failure on the part of the plaintiff to use due diligence in endeavoring to collect the money from the maker of the note; and because the question of diligence was one of law, to be decided by the Court.

To these objections the charge of the presiding Judge was a full answer. The jury were instructed, that the defendant was not discharged, under the circumstances of this case, by the plaintiff's failing to show a demand; that the true enquiry was, has the defendant sustained any damage, by the failure of the plaintiff to use due diligence in endeavoring to collect the note from the maker —that is, such diligence as a man of ordinary prudence

would use in collecting his own claim. That he might not be misunderstood, his Honor proceeds: if they believed the plaintiff could not have collected the money, by the use of such diligence, then they ought to find a verdict for him; otherwise, for the defendant. To enable the jury to come to a satisfactory conclusion on the question, he informs them what in law is due diligence. Their attention was then drawn, very distinctly, to the true point in issue between the parties, to wit, the injury sustained by the defendant, in consequence of any misconduct of the plaintiff, in endeavoring to collect the money. There can be no doubt, but that the endorsement of the note by the defendant is an express guaranty. It is so in its terms, and was not made simultaneously with the note, but nearly three months thereafter. "I hereby guarantee the payment of the within note to Tilman Farrow." There is no room for construction; it is a positive undertaking, and the defendant assumed all the responsibilities of a guarantor and no more. After ascertaining the true character of the contract, on the part of the defendant, the only enquiry is, as to the fact of damage to him, resulting from the *laches* of the plaintiff. If the plaintiff has, by any misconduct of his, put it out of the power of the defendant to secure himself in part or in whole, to the same extent is his claim upon the guarantor diminished. If the loss has been a total one, his claim is gone; if a partial one, he is entitled to redress *pro tanto;* because the obligation of a grantor is, that if the money, by due diligence, cannot be collected out of the maker of the note, he will pay it. Ordinarily it is the duty of the holder of a guaranty to demand the money of the maker of the note; but if the maker be insolvent, it is not necessary. In this a guaranty differs from an endorsement. In the latter case the endorsee is bound to strict punctuality in presenting the note for payment, and giving notice, by the earliest opportunity, to the endorser,

sought to be charged, of its dishonoree. Any neglect in either of these particulars will discharge the endorser, without any proof, on his part, of any loss or injury resulting from it. But negligence alone will not discharge a guarantor. He must go further, and show that by it he is injured. *Shewell* v. *Knox*, 1st Dev. 404; *Ashford* v. *Robinson*, 8th Ired. 114; *Story on Notes*, sec. 400; *Vanevar* v. *Woolly*, 3rd Bar. and Cross. 439, 447. The question was fairly and fully left to the jury, and they found that the defendant had suffered no loss, by any negligence of the plaintiff: and, according to the authorities cited, the plaintiff was entitled to a verdict for the full amount of his claim.

We find no error in his Honor's charge; and the judgment must be affirmed.

PER CURIAM. Judgment affirmed.

CHARLES L. GURVIN *vs.* JAMES W. CROMARTIE.

A promise by A., that if B. will marry and have a child by his wife, he will pay him a certain sum, is a valid contract, and, upon the contingency happening, B. is entitled to recover the amount, with interest from the time his child was born.

Appeal from the Superior Court of Law of Bladen County, at the Spring Term 1850, his Honor Judge SETTLE presiding.

The action is assumpsit on special promises of the defendant's testator, James Cromartie, to pay the plaintiff

$500 in consideration, that the plaintiff would marry and have issue of the marriage; and they are laid in different ways in several counts. Plea, non-assumpsit.

On the trial the case upon the evidence was this: a tract of land was devised to the plaintiff in fee simple, but with a limitation over to another person, in case the plaintiff should die without leaving lawful issue surviving him. In 1843 the plaintiff sold the land to James Cromartie for $1000, and conveyed it to him by a deed of bargain and sale in fee with general warranty. After the deed was executed, Cromartie said to the plaintiff, who had never been married, "Now, Charles, be smart and get a wife and have a child, and I will give you $500." In December 1842, the plaintiff married; and, upon hearing thereof, Cromartie said, that he was bound to pay the plaintiff $500, if his wife should have a child. In February 1846 the plaintiff's wife had a child, and, Cromartie being then dead, the plaintiff gave notice to the defendant, the executor, and requested payment—which being refused, the plaintiff brought this action.

The counsel for the defendant insisted, that there was no consideration to support the promise: that there was no evidence of any assent to the contract on the part of the plaintiff: that the plaintiff had not married and had issue within a reasonable time: and that there was no evidence that the plaintiff was the father of the child his wife had. For those reasons he prayed the Court to instruct the jury, that the plaintiff could not recover. But the Court refused to give that instruction; and his Honor told the jury, that if they found, that the plaintiff accepted the offer of Cromartie, and in consequence and by reason thereof married, and had issue by his wife at the period mentioned and gave notice thereof to the defendant, he was entitled to recover. The jury gave a verdict for $500 with the interest accrued after the demand, and judgment was given therefor, and the defendant appealed.

Strange, for the plaintiff.
W. Winslow, for the defendant.

RUFFIN, C. J. It is not needful to consider of the benefit, which the marriage of the plaintiff and the birth of issue might have been to the testator in preventing the estate, which he had purchased, from going over and making his fee absolute; since, without doubt, marriage is a valuable consideration, and sufficient to support a contract, whether executed or executory. It is generally the sole consideration on which marriage settlements are founded, and it sustains them against the creditors of the contracting parties and purchasers from them. It was so decided by Lord CLARENDON in *Douglass* v. *Waud*, 1 Chan. Cas. 99; and in *Brown* v. *Jones*, 1 Atk. 188, Lord HARDWICK said, that a settlement on the wife before marriage, though without a portion, is good—for, marriage itself is a consideration. It is most clearly so; for, by the marriage, the respective parties incur duties and obligations to, or in respect of, each other, and the one acquires in the estate of the other, or loses in his or her own, certain rights, which are valuable in a pecuniary sense. So, mutual promises between a man and woman to marry will sustain each other, and the party violating his or her promise is liable to the action of the other, as is often seen. In like manner a promise by one man to another to pay him so much, in consideration that he will marry a certain woman is valid. The same reasons make it so, upon which a marriage settlement is upheld upon the consideration of the marriage. There are many cases of actions on collateral promises to one, in consideration that the promisee will marry a third person. In *Browne* v. *Garborough*, Cro. Eliz. 63, the promise was to a woman, that, if she would marry one R. B. and one J. B. should not assure to them certain land, then the defendant would pay her £100, and the marriage took effect,

and an action was brought thereon by the husband and wife. After verdict for the plaintiffs on non-assumpsit, it was moved in arrest of judgment, that there is no sufficient consideration, as the defendant was a stranger to the *feme*. But the Court gave judgment on the verdict, giving as one reason, that it was intended the woman was induced by the promise to marry R. B., which otherwise she would not have done, and peradventure she trusted the defendant rather than J. B. *Bradford* v. *Foder*, Cro. Jac. 228, and *Berisford* v. *Woodroff*, Id. 404, are other instances in which similar actions were sustained. It is true, that in those cases it happened, that the person, whom the plaintiff was to marry, was a relation of the defendant, and that in *Browne* v. *Garborough*, some stress was laid on that circumstance. But it is quite clear, that was not material; for, it is not the benefit that may accrue to the promiser or his relation, which constitutes the consideration in such a case, but the liabilities incurred by the person marrying and the effects the marriage may have on his or her estate, real or personal. Accordingly we find a precedent, 2 *Went.* 492, in which the declaration was on a promise to pay the plaintiff £7, in consideration that he would marry one D. B., who then had a bastard; and there is another precedent, 2 *Chit. Pl.* 254, in which the declaration is on a promise to pay the plaintiff a sum named for marrying one E. F., without otherwise describing her as of kin to the defendant, or as under any particular discredit or disadvantage. In *Ex parte Cottrell*, Cowp. 742, a person gave to another a bond to pay him certain sums by instalments, in consideration that he would marry a woman, by whom the obligor had several bastard children, and, after the marriage had, the obligor became bankrupt, and the question was, whether the obligee could prove this debt under the commission. A case was sent out of Chancery to the Court of King's Bench for the opinion of the Court of law. The

Court interrupted the counsel for the creditor by enquiring, what could be objected to the bond; and when the counsel on the other side contended, that the debt could not be proved, because it was not founded on a good consideration, Lord MANSFIELD replied, that the consideration was good between the parties, as it was a stipulation between them in consideration of marriage; the one having performed his part and married the woman, the other was bound to perform his. Those cases and precedents fully establish, that a promise to pay a man for marrying a particular woman will maintain an action, after the marriage had. It follows, that a promise to pay him for marrying any woman, without designating one in particular, is likewise valid; for there is no perceptible distinction on which the law can give an action in the one case and not in the other. It was argued, indeed, that it might be a prejudice to one to marry a particular woman, and by possibility, in such a case, the man would not have married her, had it not been for the promise; whereas marriage generally is to be taken to be to the party's gratification and benefit, and, when he is left at large to his own free choice, his marriage cannot be intended to be to his disadvantage; and therefore, that in this last case the marriage is not a sufficient consideration. But the distinction seems to be entirely untenable; for experience proves, even when the parties are of their own exclusive selection, marriages may or may not be judicious or happy. And it is just as much an act of prudence for a man to refrain from marrying any woman without having a competent livelihood for himself, his wife, and a family, as it is for him, under those circumstances, not to marry a particular woman. In either case he may be induced to marry or not to marry by his having or not having a reasonable consideration. But the law does not enquire, whether the party has or has not made a fortunate match, because it is not the adequacy of the con-

sideration, which determines the validity of the promise, but it is the doing of some thing by the party, to whom the promise is made, and it is a familiar elementary principle, that such act, however trifling, constitutes a sufficient consideration. The act of marriage with any one woman must, in this point of view, be the same as that with any other; and, therefore, as far as the objection to the want of a consideration affects the case, the instructions to the jury were right.

It was next said, that the plaintiff gave no such assent to this promise as amounted to a contract between the parties, on which the other party could have an action; and, so, it was void for want of mutuality. That is but presenting the last objection in another aspect, and therefore cannot avail. There are two modes of making simple contracts and declaring on them. The one is, when one party promises to do a certain thing, and in consideration of that promise the other party engages to do something on his part. Then, as nothing is done but the making of the promises, it is absolutely necessary, that mutual valid promises, amounting to an express contract, should appear; otherwise, one of the parties might claim the benefit of the promise of the other, without in return doing any act or being liable for any loss whatever. And in such a case it is necessary only to set out the mutual promises, without averring performance on the part of the plaintiff. The other mode is, when one party promises, in consideration that the other will or will not do some act. Then, no mutual promise need be set forth or exist; but it is necessary and sufficient to show the act done. It is not requisite, that it should appear, the plaintiff might have been sued for not doing the act; for he may recover after the thing done, though it was at his election whether he would do it or not up to the moment of its execution. Thus in an action on a promise to pay the debt of another in consideration of forbearance, the

declaration sets forth no agreement of the plaintiff to forbear, but only the promise of the defendant to pay up on the consideration of forbearance for the particular time, and, then, that the plaintiff, confiding in the defendant's undertaking, did forbear during the prescribed period. In like manner are framed the precedents upon promises to pay one for marrying a particular person. They set forth, that in consideration that the plaintiff, at the instance of the defendant, would marry A. B., the defendant promised the plaintiff to pay, &c., and that the plaintiff, confiding in the promise, afterwards married, &c. In no instance is there an averment, or is it set forth as a part of the consideration, that the plaintiff agreed to marry, excepting only when the action is between a man and woman for breach of promise to intermarry. The declaration alleges merely, that the plaintiff in fact married, and that thereupon the action arose upon the defendant's promise. For, in all such cases, it is the intendment of the law, that the marriage was induced by the promise, and therefore it is not necessary to aver or prove that it was done at the instance of the defendant. *Berisford* v. *Woodroff*, Cro. Jac. 404. *Poynter* v. *Poynter*, Cro. Car. 194. *Bockenham* v. *Thacker*, 2 Vent. 71. There is, however, another case, which presents a remarkable instance of the validity of a promise by one person to pay a sum of money for an act done by another, when no other person is or can be found to do the act, and the right to claim the benefit of the promise arises simply from the performance of the act by any person and without any previous communication with the defendant. It is that of the promise of a reward for apprehending a felon, discovering lost goods, or the like; in which the promise is deemed to be a continuing one and to be binding in favor of any person, who afterwards acts upon it. *Williams* v. *Carwardirel*, 5 Car. & P. 566, and 4 Barn. & Ad. 621. And the precedents of declaration upon such offers of reward aver merely,

that the plaintiff, upon the faith of the offer, did the service, and that the defendant had notice thereof. 3 *Went.* 30. It was not necessary, therefore, that the declaration here should have averred more than it has, or that there should have been any engagement by the plaintiff to marry, in order to entitle the plaintiff to recover upon his marriage and the birth of a child.

As to the objection, that these things were not done in a reasonable time, there is nothing in it. The contract specified no time within which the marriage and birth of issue should occur; and, from their nature, the party had his life time to perform them, and, upon performance completed, could claim the compensation agreed on—at least, unless, before any act done by the plaintiff towards performance, the other party had retracted his offer.

The last ground of exception was, that the plaintiff did not prove, that he was the father of his wife's child; and to that was added here, that an enquiry on that point would be indecent, and therefore, also, that the promise ought not to entitle the plaintiff to an action. The answer is, that there is legal evidence of the paternity of the child; as it is matter of law, that the husband, who co-habits with his wife—and nothing to the contrary was suggested here—is presumed to be in fact the father of the wife's issue. Then, as to the notion of the indecency of investigating an enquiry into the legitimacy of the issue, it seems to the Court to be entirely unfounded. This is not a case of a wager between two persons upon a question involving the feelings of others or naturally calculated unnecessarily to produce indecent enquiries. On the contrary, it is a promise to pay one a certain sum in consideration of marrying and having issue of the marriage; which is a very common contingency, upon which estates devised are enlarged or defeated, and it is also a contingency on which almost all the limitations in marriage settlements depend. They can offend the feelings

or delicacy of no one, but are contingencies naturally connected with the proper provisions for a family, and therefore they almost always give rise to important limitations in settlements. The present is a transaction much of the same nature; whereby the plaintiff, who was single at the time, was to become entitled to demand a particular sum from the testator, upon his future marriage and the birth of issue.

PER CURIAM. Judgment affirmed.

ALEXANDER KELLY vs. JESSE F. MUSE

Where there is a judgment against two or more, an appeal cannot be granted unless all the defendants join in the appeal.

The cases of *Smith* v. *Cunningham*, 8 Ired. 460, *Donnell* v. *Shields*, 8 Ired. 371, *Dunn* v. *Jones*, 4 Dev. and Bat. 154, *Gilliam* v. *Hicks*, 4 Dev. 217, *Jones* v. *Ross*, 2 N. C Law. Rep. 450, and *Brown* v. *Conner*, 10 Ired. 75, cited and approved.

Appeal from the Superior Court of Law of Moore County, at the Spring Term 1850, his Honor Judge SETTLE presiding.

The plaintiff warranted four defendants, Muse, Spivey, McNeill, and McDonald, on a former judgment for $40, and on the 1st of January, 1837, judgment was rendered against the four for debt, interest, and costs. The Justice then made this entry: "The defendant, Jesse F. Muse, no other defendant in the case being present, prays an appeal, and it is granted, by giving for surety one Wil-

liam D. Harrington." In the County Court several pleas were put in generally for the defendants, and the cause pended until July, 1847, when Spivey came into Court and declared that the appeal had been taken and prosecuted without his consent or knowledge, and moved to dismiss the same. The Court refused the motion; and then the plaintiff moved to dismiss the appeal. But the Court refused that motion also, and the plaintiff appealed. The Superior Court at the next term refused to take cognizance of the plaintiff's appeal, and dismissed it, and remanded the cause with a writ of *procedendo* to the County Court. At July term 1849, the plaintiff again moved the County Court to dismiss the appeal from the judgment of the justice of the peace, upon the ground, that it was a joint judgment against four defendants, and one of them only appealed; which motion was overruled, and the plaintiff appealed. At February term 1850, the Superior Court reversed the last decision of the County Court, and allowed the motion of the plaintiff to dismiss the appeal, upon the grouud stated by the plaintiff, and thereupon the defendant, Muse, by consent, was allowed to appeal to this Court.

Kelly, for the plaintiff.

Mendenhall, Haughton, and Winston, for the defendants.

RUFFIN, C. J. The decision of his Honor, from which this appeal was taken, is in conformity with the judgments then recently given by this Court in the case of *Smith* v. *Cunningham*, 8 Ired 460, and *Donnell* v. *Shields*, 8 Ired. 371, and was, probably, founded on those judgments. Of course, as a majority of the Court concurred in them, his Honor's decision must stand affirmed, unless the minds of those Judges can be fully convinced, that they were, before, wrong. As that is not the case, it would ordinarily be sufficient to refer to the previous

cases. But as there is not now an unanimity among the Judges, it is, perhaps, proper, that the reasons which govern the majority, should be stated a little more at large. Upon recurring to the cases mentioned, it will be perceived, that they occurred in 1848, and that the whole Court at that time united in them; and also that they professed to follow, and, in fact, do follow a rule laid down upon this point in the earlier cases of *Dunn et al.* v. *Jones*, 4 Dev. and Bat. 154, and *Gilliam* v. *Hicks*, 4 Dev. 217—the former of which occurred in 1838, and the latter in 1833, at which periods two other Judges sat in the Court, and the Court was then also of one mind. It is also a fact well known, that the case of *Hicks* v. *Gilliam* was decided in conformity with the previous general opinion and the established practice of the profession. Under such circumstances the Court does not consider it allowable now, whatever might have been the opinions *ab origine* of the Judges individually, to overturn a rule and principle laid down and acted upon, as the ground of decision of the rights of persons, in such a series of cases. The importance of adhering to well considered judicial precedents, running through several generations of lawyers and judges, can hardly be overrated. It is difficult duly to estimate it, except by turning one's mind to the mischiefs, which would arise from a total disregard of them, and the misery to a people, who could not tell what the law was, under which they were living, until they took the opinion of the judge for the time being upon every particular question. That would, indeed, be both a new and a dangerous principle; one which the Court cannot adopt. But the majority of the Court must acknowledge, that, as it seems to them, the old decisions are right, which do not allow an appeal to one of two or more defendants from a joint verdict and judgment. It is true, hardships not unfrequently grow out of the rule; and it must not be supposed that the Judges hitherto

have not been aware of them and willing to prevent them, if they could. In some of the cases the hardship was as great as it could be—for example, in *Donnell* v. *Shields*: and observations were made on the hardship with the view of calling the attention of the legislature to it. But the grievance has ever been found to be beyond the reach of the judicial function. If to be remedied at all, it requires the power of the legislature: and we are persuaded, that, whenever the attempt shall be made, the subject will be found to be one, which will require much caution and consideration to provide a fit remedy without producing or opening the way for greater mischiefs than those obviated. At all events, the Courts have no power of legislating upon the subject. The statute gives the right of appeal, and by it annuls the judgment appealed from, and directs a trial *de novo* in the appellate Court, except in appeals to the Supreme Court. How is it possible a Court can say, that as to one of the persons, against whom the judgment was given, it is annulled, but not as to the others? The language is the same as to appeals by defendants and by plaintiffs. Now, if one defendant can have an appeal, how can it be denied to one of two plaintiffs? We do not say, that the two cases ought to be governed by the same rule; that is for the legislature to determine. But it seems to us, as a matter of judicial construction of a statute, or of judicial authority independent of a statute, an action standing for trial on issues before a jury, cannot in this State be split up, so that different parts of the case will be in different Courts at the same time, in the one instance more than in the other. It has been supposed, that the Court is at liberty to do so, upon, what is called, a new principle, laid down by the legislature, namely, that contracts shall be deemed joint and several, and that actions may be brought accordingly. But, clearly, that cannot affect rights, to which that principle has not been

applied by the legislature, or alter the constructions of statutes previously existing. If the legislature adopts a new policy, the Courts must enforce it as far as the enactment commands or authorises. But they cannot carry the principle itself farther than the legislature has carried it, so as to make it reach cases which the legislature would not venture to touch. When a statute authorised an appeal from a judgment against two upon a joint contract, it followed, upon the principles of the common law, that there could not be an appeal, unless both defendants joined in it: because the judgment could not be for one and against the other, but must be for both, unless it were against both. There, another statute authorises a creditor to sue on a joint contract as if it were joint and several—that is, to sue all the parties together or each separately. When the creditor sues jointly, surely it is not for the defendants, or one of them, to say, that the creditor shall be deprived of that privilege, and each of them be allowed to appeal and turn the joint action into two several ones. Nor can the Court allow, without some statute to help them, that upon a judgment against two, the plaintiff may take out several executions as upon two separate judgments. The symmetry of the law would be completely marred thereby. It is true, that, when an action *ex contractu* is brought against two, there may be a verdict and judgment for one and against the other, as was held in *Jones* v. *Ross*, 2 N. C. Law Rep. 450; and that seems to have been carrying the construction of the act of 1789 very far—farther than, on principle, it ought to be carried: because it allowed of a variance between the declaration and evidence, by permitting the plaintiff to recover on the several contract of one, when the issue is, whether the two contracted together. But it was so decided, and so long decided and acted on, that in *Brown* v. *Conner & Long*, 10 Ired. 75, the Court deemed it a duty to submit to it. Yet that de-

cision by no means affects the construction of the statutes granting appeals, or alters the rule of law as to the process to be sued out on joint judgments. A particular enactment, altering the law in one point or on one subject, cannot be judicially extended to other points and other subjects, not within the purview of the act; but each statute is necessarily to be construed in reference to the previous law upon the subject of that act, the mischief, and the remedy provided by the act. The acts granting appeals form a system of law upon that subject, and are to be construed upon their own terms and such reasons as apply to that particular subject; and, as it seems to the majority of the Court, the point is concluded by authority and entirely supported by reason, that an appeal, on which another trial by jury is to be had, cannot and ought not to be taken by one of several defendants, by himself, so as thereby to split up the cause into several parts, and greatly multiply costs.

It must, therefore, be certified to the Superior Court, that there is no error in the order of that Court, from which the appeal was taken to this Court: so that the Superior Court may remit the case to the County Court, with directions to dismiss the appeal to that Court from the judgment of the Justice of the Peace, to the end that the plaintiff may have execution of the judgment given by the Justice of the Peace.

Pearson, J. This case presents the question, is a judgment against two or more joint? or is it joint and several, and to be treated in its consequences, as if the defendants had been severally sued?

The decision of *Trice* v. *Turrentine*, and *Jackson* v. *Hampton*, at the last term, was put by me upon the ground, that the acts of 1789, 1796, and 1797, were intended to do away with the hardships, growing out of the doctrine of joint obligations, joint judgments, and

survivorships; and had made a change in the law by abolishing the principle of the English law as to joint judgments, and introducing the principle, that the defendants in a judgment are to be treated, as if they had been "severally sued," whenever the ends of justice required it. And I ventured the opinion, that as we had, by a liberal construction of these remedial statutes, adopted a *new principle* and got rid of all those hardships, except one, (which is the one involved in the present case,) it was wiser to rid ourselves of that also, by overruling the cases which adhere to the *old principle*, than to embarrass the law, by attempting to sustain those cases by distinctions "too fine for use."

This case made it necessary to review that opinion.—I have performed the duty most anxiously, and the result is, a clear conviction of its correctness.

My position is, that the statutes referred to, changed the law and introduced a new principle; that this new principle has been acted upon by the legislature and has been adopted by this Court, in two cases, which have never been drawn in question, and which directly conflict with the class of cases adhering to the old principle; and that to relieve ourselves of the confusion, in which we are now involved, and the great confusion, to which we will be exposed in future, it is necessary to adopt the one principle or the other by overruling the cases which adhere to the old principle or the cases which adopt the new principle. If this necessity exists, no one will contend that the new principle should give way to the old one, with all of its absurd consequences.

The old principle is, that all of the defendants are "a unit" and make but one, or, as it is elsewhere expressed, "though they are several persons, yet they make but one defendant, when jointly sued." 6 T. R. 525.

As a consequence of this principle, all of the defendants must join in an appeal, and the plaintiff, to fix the bail of

one, must first run a *ca. sa.* against all. Now, by the cases of *Trice* v. *Turrentine*, and *Jackson* v. *Hampton*, as decided at the last term, the plaintiff is relieved from the hardship of being obliged to run a *ca. sa.* against all of the defendants; and the cases of *Trice* v. *Turrentine*, and *Waugh* v. *Hampton*, 5 Ired. 230, 241, which adhere to the old principle, are overruled. It is true, the two Judges, who make the decision, do not agree as to the ground, upon which it is put. The one adopts a new principle and gives the relief directly: the other gives the relief indirectly, by allowing the plaintiff to instruct the officer not to execute the writ upon one; still the result of the decision is to relieve the plaintiff from a hardship, which is a consequence of the old principle, and it must weaken the authority of the only class of cases which still adhere to it; for, if the plaintiff is relieved from one of the consequences, a portion of the defendants should be. It was the plaintiff's act to sue both, in one action, instead of having two actions, and the judgment in those cases remained as to all of the defendants, unreversed and in full force: whereas, in this case, the defendant had no option as to whether there should be two warrants or one, and the judgment would be vacated as to one, if the appeal is allowed, leaving it in force as to the other, just as if there had been two warrants. And if the plaintiff, in the one case, is relieved from the consequence of his own act, the defendant in the other ought not be prejudiced, by the accident, over which he had no control, that the plaintiff had sued both in one warrant, instead of having several warrants against each.

At all events, this is a favorable occasion to assail the old principle, and I now proceed to sustain my position. By the old principle, if, pending a suit and *before* judgment, one of the defendants died, his executor or administrator could not have been made liable, although he was the only solvent defendant. The act of 1797 pro-

vides, that in such case, such process and judgment may be awarded against the executor or administrator of the deceased defendant as if he had been "sued severally."—Here *the new principle* is announced, and is applied to one case, so as to relieve against a hardship of the old principle, and the question is, shall this new principle, by a liberal construction of these remedial statutes, be extended to all cases coming within the same mischief, so as to relieve against all the hardships? or are we to "stick to the letter" and confine the relief to the cases expressly provided for?

The Legislature has acted upon the new principle.—The act of 1820 provides, that if more suits than one be instituted against several obligors, the suits, on the return of the writs, shall be consolidated. Now, the law makers must have supposed, that the old principle and its consequences had been abolished, and that the new principle, by which the defendants are to be treated as if "severally sued," was in force, or else they intended manifest wrong; for, by the old principle, the plaintiff could not proceed against the bail of each, as he could have done, if his suits had been let alone; and if one of the defendants had died *after judgment*, the plaintiff had no remedy against his representative; and, on the other hand, the defendants, after the consolidation, must all join in an appeal; whereas, if the suits had been let alone, each defendant had the right to appeal: and upon the supposition, that the old principle was in force, all these hardships were imposed upon the parties, by a wise Legislature, to save a little cost.

Again, the act of 1844 provides, that no *ca. sa.* shall issue, unless the plaintiff makes oath that the defendant conceals his property. This shows conclusively, that in the opinion of the Legislature, the defendants are to be treated as if they had been "severally sued:" for, if the defendants are "a unit," a fraudulent debtor must go free,

if he has an honest co-defendant, as to whom the oath cannot be made. It is a condition precedent and no officer would be justified in issuing a *ca. sa.* against both, upon an oath as to one.

In *Jones* v. *Ross*, 2 N. C. L. R. 450, (1816) it is decided, that in an action *ex contractu*, judgment may be *against* one and in *favor* of the other defendant. This is directly opposed to the old principle; and by a liberal construction of the statutes, referred to, the new principle is adopted, and each defendant is treated, as if he had been "severally sued," and this in favor of the plaintiff, who elected to join the two in one action.

So in the case of *Smith* v. *Fagan*, 2 Dev. 298, (1830,) it is said, "it is the policy of the authorities of the Country to extend the principle of the act of 1789, as far as will *completely* remedy the evils at common law," and it is held that the old principle, that a judgment is joint, so that, if one defendant dies *after* judgment, it cannot be enforced against his estate, is changed, by a liberal construction of those statutes, which apply to judgments, as well as to obligations strictly so called. Here, the new principle is adopted, and the defendants are treated as if they had been "severally sued," and this too in favor of the plaintiffs. Now then, can it be insisted, that the old principle should be adhered to so as to subject defendants to its hard consequences? They have no election as to whether there shall be one writ or two; and it is but reasonable, that although the plaintiff chooses to include them in the same writ, they should be treated and allowed the same rights, as if they had been severally sued. These two cases adopt the new principle, and have been acted upon by the Courts and the profession ever since. Scarcely a Court is held, where judgment is not rendered against one defendant and in favor of the other, and where the representative of one defendant, who died *after judgment*, is not proceeded against, and it is done so much as a mat-

ter of course, and with so little question, that many practitioners are not aware of the fact, that under the old principle the law was to the contrary.

The old principle is adhered to in only one class of cases, *Hicks* v. *Gilliam*, and six other cases which follow it, where it is held, that as the defendants are a "unit," all must join in one appeal, and if one refuses, the others must lose their rights, without hope of relief.

The new principle is adopted in two cases, which have never been questioned. The old principle is adhered to in one class of cases, seven in all, but the authority of these cases, (as they all stand upon the same ground) is weakened by the formidable array of numbers. The new principle, adopted in *Jones* v. *Ross*, and *Fagan* v. *Smith*, was so much in accordance with the sense of the profession and the common idea of justice, that these cases have never since been questioned, while the old principle, which is acted on in *Hicks* v. *Gilliam*, was so much at variance with the sense of the profession and led to such hardships, that it was not only questioned, but sent up to this Court, sometimes under one aspect and sometimes under another, and the present is the eighth time that this Court has been appealed to for relief. The struggles of the profession and of the public aganist the old principle, have been like the convulsive efforts of a strong man, seeking to relieve himself from a weight, with which he is oppressed.

That these two sets of cases cannot stand together is self evident. The one adhere to the old principle, that the defendants are a "unit;" the other adopts the new principle, that the defendants, although sued together, are to be treated and have the same rights as if "severally sued." That confusion will grow out of contradictory decisions, based upon these inconsistent principles, and that there is a necessity to adopt the one and reject the other, is painfully exhibited, by the cases of *Trice* v. *Tur-*

rentine and *Waugh* v. *Hampton*, over-ruled by *Trice* v. *Turrentine* and *Jackson* v. *Hampton*; and the case of *Brown* v. *Conner*, 10 Ire. 75; there the defendant was made to feel the weight of both these inconsistent principles, being sued with one Long, and judgment in the County Court being rendered against both, according to the old principle, they were forced to appeal jointly. In the Superior Court it was proven, that Conner was not liable for the debt, and a verdict was rendered in his favor, and he had judgment for his costs, and that he go without day; but, according to the new principle, and on the authority of *Jones* v. *Ross*, judgment was rendered against Long; and the result was, that judgment was rendered against Conner upon the appeal bond. and he had to pay the plaintiff's debt and costs, notwithstanding there had been a verdict and judgment in his favor; and such must be the hard fate of all defendants, until the one principle is adopted and the other is wholly rejected.

I should not feel at liberty to insist upon over-ruling the cases of *Hicks* v. *Gilliam*, and the other cases, which follow it, but for the fact of their being directly opposed to the two acts of the Legislature and the two cases to which I have referred, and to which must now be added *Conner and Brown*. This, I think, not only justifies, but makes it necessary, to over-rule them.

No one can read the case of *Brown and Conner*, and say, the law ought to stand as it does. That case was correctly decided. The conclusion is logical; there was no escape from it, without over ruling *Jones* v. *Ross*. That had been attempted in the Superior Court; but this Court sustained it, and, *in doing so, over ruled Hicks* v. *Gilliam*, for the two cannot stand together.

The defendants are a "unit" and must join in an appeal. After *they join* in an appeal they *cease to be a unit*, and the plaintiff is entitled to judgment against one, although

he shows no cause of action against the other. Is it right to let this state of things continue?

I am not in favor of judicial legislation. Where new combinations of circumstances and changes in the state of society develope defects in the law, it is the province of the Legislature to remedy these defects. But where a defect is occasioned by a train of decisions, all involving the same error, it is the duty of the Court to remedy this defect, because it is the consequence of its own wrong action and it should correct its own error, and should not continue in error, until "confusion becomes worse confounded," in the hope that the legislature will extend its omnipotent arm and help the Court out of a difficulty of its own creation.

The Court not only has power to correct its own error, but it is most proper that it should do so: for, knowing the source and extent of the error, it can best apply the remedy—whereas, the legislature, not knowing the case "in all of its bearings" may handle the subject too roughly; and while applying the remedy to one evil, may affect injuriously important principles in other parts of the system.

Per Curiam. Judgment affirmed.

HENRY HILL vs. STEPHEN DOUGHTY.

Where one had a claim against three distributees, on account of assets received from an intestate's estate, and they jointly promised, verbally, that they would pay the debt; *Held*, that this promise was void under our Statute, being only oral, because each of the defendants was liable separately in proportion to the assets he had received, and by this promise each made himself responsible for the liability of the others.

Appeal from the Superior Court of Law of Beaufort County, at the Spring Term 1850, his Honor Judge BAILEY presiding.

The action is assumpsit, and non-assumpsit pleaded: and it was decided upon the following case agreed:

In May 1829, Thomas Doughty was appointed the guardian of John Doughty, an infant, and gave bond with George Hill as a surety. Thomas Doughty died in 1830, intestate, leaving three infant children, the two defendants and a daughter, who were his next of kin. William E. Smaw was appointed the guardian of the infants in 1835, and in 1838 he was also appointed the administrator *de bonis non* of Thomas Doughty, and received assets of his intestate. When the defendants came of age Smaw settled with each of them, and paid to each his share of the estate, without taking any refunding bond. In 1847, John Doughty brought suit on the guardian bond of Thomas Doughty against Smaw, as his administrator, and against Henry Hill, the present plaintiff, as the executor of George Hill, who was then dead; and the damages were assessed to $100 for a balance due to the ward, and judgment endorsed accordingly. A *fieri facias* was

issued thereon in September 1849, and on the first day of December following, the present plaintiff paid the same. He had before that time settled his accounts as executor and paid to sundry legatees all the estate, except such parts as were given to him by the will, which he retained as his own legacy. At the time of the suit brought by John Doughty, Smaw and the sureties to his administrator's bond were insolvent, and have been ever since.—While the execution was in the sheriff's hands, the attorney of the plaintiff, Hill, informed the present defendants, "that he had been instructed to commence proceedings, to subject them to the payment of the amount recovered, upon the ground that it was a claim against their father's estate and they had his property;" and the defendants then promised the attorney, that if he would not commence proceedings against them and run them to costs, they would pay the execution at or before its return; and the attorney informed the plaintiff thereof, and was instructed not to commence any proceedings against the defendants, until after the return of the execution. The defendants did not say expressly, that each of them would pay a part of the demand, though they remarked, that their sister was equally liable, and they said, they would make her pay her proportion. Both of the defendants, however, when together, told the attorney, as aforesaid, that "they would pay the judgment and execution."

It was agreed, that, if the opinion of the Court should be for the plaintiff, he should have judgment for $124 and the costs: and that, if the Court should be of a contrary opinion, there should be judgment as of non suit. Judgment was given for the plaintiff accordingly, and the defendants appealed.

J. H. Bryan and J. W. Bryan, for the plaintiff.

Donnell, for the defendant.

RUFFIN, C. J. Several objections were taken at the bar to the recovery: but it is sufficient to consider one of them, as the Court deems that fatal. Supposing, then, that the action is properly brought in the individual capacity of the plaintiff, and also that the promise is to be deemed joint and not construed with reference to the previous several liabilities of the next of kin; still the action will not lie, because the promise was not in writing.—The argument for the plaintiff is, that the defendants were bound in equity to exonerate the plaintiff from the payment of the judgment, or to reimburse to him what he might pay on it: and that such a liability will support an express promise to pay the money. Without saying how far next of kin may, on account of distributive shares received, be liable in equity to creditors upon the *devastavit* and insolvency of the administrator, and admitting such liability for the purposes of the present question, and also that an equitable liability will sustain an express promise at law, yet it will not follow, that this verbal promise by two of the next of kin will maintain this joint action against them. If an equitable liability be a good consideration, it is so as far only as the liability went; for even forbearance will not uphold a promise to pay an unfounded demand. If, then, a Court of law can recognise an equitable liability as a consideration for a promise, it must follow, that the Court is obliged to determine the extent of the liability, in order to ascertain, how far it is a sufficient consideration, and also whether the promise, founded on it, is such an one as may be oral or must be written—in other words, whether the equitable liability was that of the party promising, or of some other person. For the statute, which requires a promise to answer the debt of another to be in writing, must, of necessity, be construed to mean all debts, whether legal or equitable. Now, the liability to creditors of the defendants and their sister, as next of kin, was not joint,

but arose, if at all, by reason of that portion of the assets of their father, which came to their respective hands as their several shares of the estate. Each was therefore liable for only an equal proportion of the money; at all events, in the first instance, and while the others were able to pay their parts, which is not questioned here.—Hence, it is obvious, if one of the defendants had verbally promised to pay the whole of this demand, that the promise would not have been binding, under the statute of frauds, beyond his own one third: for, beyond that, the liability was not his own, but that of another. It seems clear, that an undertaking by the defendants in a joint form to pay the whole debt cannot alter the rule of law or the legal effect of the promise as to each, in that respect. For, if two persons owe another separate debts, then joint oral promise to pay both debts, cannot sustain a joint action, since it is a promise by each to answer for another in respect to all but his own original debt.—Therefore the plaintiff cannot have judgment in this action: not against both defendants, as there is no valid joint promise: nor against the defendants separately, as the plaintiff cannot have judgment against one defendant for a part of his demand, and against the other for the residue.

Per Curiam. Judgment reversed and judgment of non-suit.

DEN ON DEMISE OF CLEMENT JOHNSON *vs.* JAMES FARLOW.

When a deed from A. to B. calls for the line of an adjoining tract, testimony cannot be introduced to control that call, by shewing that, at the time of the execution of the deed, they ran to a different line; that B. afterwards said this last was his line, and that A. and those who claimed under him cultivated for many years up to this line.

Appeal from the Superior Court of Law of Randolph County, at the Special Term in July 1849, his Honor Judge BATTLE, presiding.

Morehead and *Iredell*, for the plaintiff.
Winston and Mendenhall, for the defendant.

PEARSON, J. *In* 1767, Henry E. McCulloch conveyed to one Thomas King a tract of land, which is represented in the annexed diagram by the paralellogram A. B. G. O.

In 1794, a grant issued to one McCrackin for the tract of land represented by these letters, T, X, G, R, D, G, J, P, Q, R, S, (at G.) The grant calls for a post oak, *then North* 62 deg. *East*, 27 *chains to a black oak*, (at R,) then East 49 chains, to a *stake in King's line* (at D,) then North 29 chains to a black oak, his corner (at G,) then East 39 chains to a stake (at J) and around to the beginning.

In 1797, King conveyed his tract of land to one Laughlin.

In 1801, Laughlin conveyed to McCrackin the land represented by the letters L. E. H. O, which was the Northern part of the land deeded to King by McCulloch and a small part of McCrackin's own land represented by the letters D. E. H. G. The deed begins at a poplar (at L.) thence West 130 poles to a corner post oak (at E) on the next side of the tract, thence North 130 poles to a stake (at H,) thence East 130 poles to a stake (at O,) thence South to the beginning.

In 1807, McCrackin conveyed to one Andrews the land represented by the letters F. (or M.) N. U. Z. G. R. E. (or D.) The deed calls for a post oak in the original line at Z., thence South 30 chains to the old corner post oak (at G.) *then North* 62 deg. *East* 27 *chains to a black oak* (at R.) *then East* 49 *chains to a stake King's line* (at E. or D.) then North to the beginning. The lessor claimed under Andrews, and the only question in the case was, did the deed from McCrackin to Andrews, in the call from the black oak (at K.) "*thence East* 49 *chains to a stake in King's line*," run to D. or did it stop at E.? It was proven that there was a post oak at E. marked as a corner, which corresponded in age with the deed from Laughlin to McCrackin in 1801, and a witness swore, that in 1807, when the deed was made by McCrackin to Andrews, a survey was made and they ran the line from K. to E. and from E. to H., and that after his purchase Andrews said, that a fence on the line E. H. was on his line. Several marked line trees were found on the line E. H. It was also proven that McCrackin, after he conveyed to Andrews, cultivated up to the fence at E. H. for several years, and that Morrison, under whom the defendant claims, after he purchased in 1818, continued to cultivate up to the same fence, until the year 1821 or '2, when it was turned out and permitted to grow up as an old field. The defendant claimed under one Morrison, to whom McCrackin conveyed in 1818.

His Honor charged, "that King's limiting the line B. D. G. according to the original calls, the plaintiff would be entitled to recover, unless the defendant could show, that it had been subsequently established elsewhere; that when McCrackin purchased the upper part of the King grant from Laughlin in 1801, he owned the whole land, and it was competent for him then to run the line E H. and establish it, as the line between his original grant and the land purchased of Laughlin. And if the jury believed he did so, that line then became the King line, and would be the line called for in the subsequent deeds, unless there was evidence to show, that it had been afterwards run and established at another place of which there was none. To establish the position, that it was competent for McCrackin to establish the line E. H., upon his purchase from Laughlin, the Court remarked, that if he purchased a part of his own land, he would be estopped from saying it was not Laughlin's, because he had by his own deed established the line E. H. The Court told the jury, they were to enquire whether the evidence satisfied them that the line E. H. was established in 1801, and if so, they would find for the defendant. But if the evidence preponderated in favor of the line B. D. G. they would find for the plaintiff."

His Honor was correct in the position, that B. D G. being ascertained to be the King line, the call in the deed to Andrews from K., "then East 49 chains to a stake in King's line," must go to the line B. D. G., unless there was something to control it. We think there was nothing to be submitted to the jury as sufficient, if true, to have this effect. There was error in submitting the question to the jury, instead of charging that there was nothing to control the call.

Admit that in 1801, when Laughlin made his deed to McCrackin, the line E. H. was run and marked and established as the line up to which Laughlin conveyed to

McCrackin, that fact cannot control the call in the deed to Andrews, for it was a matter between Laughlin and McCrackin and although McCrackin has a right to make a line on his own land when he pleased, yet the fact of his doing so could not make that line "the King line," so as to have any effect in a deed which he afterwards made to Andrews, inasmuch as the establishing of this new line is in no manner recognised or referred to in the deed —the calls are the same as those in the grant to McCrackin—and no allusion is made either to the fact that McCrackin had purchased land of Laughlin or to the fact that the line E. H. had been run and marked. The deed to Andrews does not connect him with these collateral acts, and his title cannot therefore be affected by them.

The testimony that when McCrackin sold to Andrews, a survey was made and they ran from R. to E. and from E. to H.; that Andrews afterwards said the fence at E. H. was on his line; and that McCrackin, and those, under whom the defendant claims, cultivated for many years up to this fence, cannot have the effect of controlling this call in the deed. It would not be admissible for the purpose of controlling "corner and distance," and, *a fortiori* 'it cannot control a call for the line of an adjoining tract."

We are not certain that we comprehend the meaning of his Honor, in what he says, about an estoppel. But we are certain, that the doctrine of estoppel has no application in this case, and the plaintiff has a right to complain of the allusion made in reference to it, as being apt to mislead the jury. It may be, that as between Laughlin and himself, McCrackin was estopped from denying, that he had purchased up to the new line, which they had established. But in the same way he was estopped from denying that the State had granted to him up to the King line, and so there was an estoppel against an estoppel, which left the matter "at large." After Laughlin had

made the deed, he had nothing more to do with it. The idea that McCrackin was estopped, as against himself, is absurd, and his Honor could not have intended to express it. The truth is, that after McCrackin had become the owner of all of the land, he had a right to sell off to Andrews just as much as he pleased; and the only question was, how much did he convey? His deed says he conveyed up to the King line and there was nothing to control it, and give to it the same legal effect, as if it had called for the *line established* by the deed from Laughlin to McCrackin, which is not referred to, and with which Andrews and the lessor of the plaintiff, who claims under him, were in no wise connected. So the doctrine of estoppel was not involved in the case, and the allusion to it had a tendency to mislead the jury.

There must be a *venire de novo*.

PER CURIAM Judgment reversed and *venire de novo*.

WILLIAM IRIONS *vs.* JOHN COOK.

Where A, a citizen of North Carolina appointed B. in Tennessee, to lease for him a certain tract of land in the latter State, and B. accordingly leased it, but the lessor, not being willing to trust A., required B. to give his own note for the rent, which he did and he afterwards paid it; *Held*, that this was an undertaking by B. within the scope of his general authority; that A. was bound to reimburse him, and that it was not necessary for B. to give to A. any notice of the payment, to entitle him to an action against A. for the money so paid.

Appeal from the Superior Court of Law of Nash County, at the Spring Term 1850, his Honor Judge MANLY presiding.

This was an action to recover $130, with interest from December 1847. The plaintiff declared in assumpsit in several counts. 1st. Specially on the case 2nd. As agent of the defendant upon a contract of indemnity. 3rd. For money paid to the use and at the request of the defendant. 4th. As between debtor and creditor for money laid out and expended at the instance and for the use and benefit of the defendant.

In the progress of the trial, it was proposed to read depositions taken on the fifth and sixth of January 1849.—Their admissibility was objected to, on the ground, that the *notice* of place was not specific enough. The objection was over-ruled. In the deposition of John W Mathews, he states, that he saw Irions pay Blackwell the sum of $130: and it was explained at the time of the payment, in conversation between them, to be for the rent of the land, taken for the defendant's use. This conversation was objected to, but over-ruled. The proofs are in depositions and letters.

The defendant contended: 1st. That the agent had no authority to obtain the land upon his own credit; and making a contract of this sort and paying the money without request could not give him a right of action. 2nd. That the plaintiff could not at any rate sue without a previous notice of the demand.

The Court instructed the jury, if the defendant gave Irions general instructions to rent the land in question for him, without directing in what particular manner it should be done, and it became necessary in order to attain the object, for the agent to make himself primarily responsible, it was within the range of his power to do so. And this he might do as well in case where his principal was known to the other as where he was unknown. And if the agent, Irions, contracted as above supposed, or by his own credit, for the land, and kept it for his principal during the year and has paid the rent according to contract,

he is entitled to recover it back with interest. And no notice of the demand or of suit is requisite in such case previous to action.

Louisburg, N. C., January 11th, 1846.

Mr. Jones: Your letter of the 25th came to hand last night. I was glad to hear from you and your family. I got home the 20th of last month, but would have got home sooner, if I had come straight on. I stopped nine days at my brother's in Georgia, and left him anxious for me to stay longer with him, but could not. I have bought you a blacksmith. They tell me he is a good one. He is about 25 years old. If you will take him, you can get him for $800: and if you don't want him, my brother will take him at that price. You may have refusal. I don't know when I shall start to Tennessee, but will come as soon as I can. If you don't see me by the 1st of March, I shall be there by the first of the fall. Tell Mr. Irions I am much obliged to him for his kindness to me, as I did not know but what I came up to my promise. If I don't get to Tennessee before the fall, I shall want the place he has rented for me. Tell him not to let it go, as I shall want it. My father's health is very bad at this time, but I think it will be so I can take him out next fall, &c.

Signed "JOHN COOK."

To "Thomas C. Jones."

Nash, J. Several exceptions were taken by the defendant to the competency of the evidence, offered by the plaintiff and admitted by the Court. The first is, as to the admissibility of the depositions—the notice under which they were taken, being, as insisted, not sufficiently explicit. Without passing any opinion upon the point raised, it is sufficient that there was a cross examination by the defendant. As the object in giving notice, is to

enable the party to prepare for the examination and to attend if he thinks proper, if he does attend and cross examine the witness, a waiver of the notice is to be presumed and the deposition is well taken without showing any notice—the very object of giving it is attained.—*Beasley* v. *Downey*, 10th Ired. 286.

The next exception is, as to the conversation between Irions, the plaintiff, and Blackwell, the person from whom the land was rented, which was made at the time the rent was paid. The plaintiff took a receipt from Blackwell for the money, the parties then stating for what it was given. It is a familiar rule of law, that declarations made by a party at the time a particular transaction takes place, are *pars rei gestæ*, a part of the transaction, as explanatory of it. It is true, parol evidence cannot be received, to vary or alter a written contract; but this is a receipt and may be explained by other testimony, because the law does not consider the writing as the best evidence of the transaction to which it relates. *3rd Phil. on evidence*, 1475, in notes. Now the parol evidence was given, perhaps unnecessarily, to explain why and for what purpose the money was paid by the plaintiff. The declarations were properly received.

The defendant contends, that the agent had no authority to obtain the land upon his own credit, and that making a contract of this kind and paying the money, without request, could not give a right of action; and second, that the plaintiff could not, at any rate, sue without a previous notice of the demand. Neither of the objections can avail the plaintiff, under the facts stated in the case. It is a sound principle, that one man cannot, by paying a debt of another, without his request, make him his own debtor, and thereby entitle himself to an action against him. But that principle has no application here. The plaintiff was not acting officiously, either in binding himself or paying the money. The exception concedes that

the plaintiff was the agent of the defendant. The case shows he was his special agent, to do a particular thing, with unlimited powers, as to the mode and manner of doing it. His instructions were to rent that particular piece of land, at the price of one hundred and twenty dollars, but if he could not get it for that, to give Blackwell his price. Such an agency is sometimes called a general agency. *Story on agencies*, sec. 18. Were the means used by the defendant unusual, in making such a contract as he did make? Was there anything in the instructions received by him, which forbade the use of such means? The object of the defendant was to rent that piece of land; and the plaintiff was instructed to give the lessor his price. But Blackwell would not take the defendant as his debtor; but insisted that the plaintiff himself should become bound. He did so: and without it the lease would not have been made. Under such circumstances the plaintiff had the right to bind himself to pay the rent. In doing so, he only bound himself as far as the defendant, his principal, would, as a lessor, have been bound. The case farther discloses, that the defendant was apprised by the plaintiff of his having rented the land, and the defendant approved of it and directed him not to give it up. If the plaintiff had a *right* in executing this agency to bind himself, then it follows as a necessary consequence, that when he paid the rent, the money was paid to the use of the defendant and he is bound to repay it. Mr. Story, in his treatise on agency, sec 335, states that an agent has a right to be reimbursed all his advances, expenses, and disbursements made in the course of his agency, on account of and for the benefit of his principal, and which grow out of the employment and are incident to it. The direction to give Blackwell his own price, was an express request to use his own funds or credit, to effect his object; and it does not appear that Irions had any funds of the defendant in his

hands. But whether the authority was express or not, from the nature of the agency, it was implied. If the lessor had insisted that the rent should be paid in advance, his instructions would have authorised the plaintiff to pay it; and he should have had a clear right of action against the defendant.

It is further urged by the defendant, that he was a guarantor, and, as such, was entitled to notice of the payment of the money, by the plaintiff, before the action was brought. In the transaction there is no feature of a guaranty. That is a contract, ordinarily, of suretyship. With whom did the defendant in this case form the contract? Not with Blackwell, the lessor, for he knew when he let the land, that the plaintiff was the agent of the defendant, and he expressly refused to trust his responsibility: but insisted on that of the plaintiff. It was upon his credit the contract was made and to him alone did he look for his rent. With the plaintiff no *such* contract was made or implied, except such as arises in every case, where one man pays money for another, at his request, and in such cases no notice is required of the payment of the money. This is very similar to the case where a bill is accepted for the honor of the drawee and the acceptor pays the money; the law implies a request on the part of the drawee. In the argument, the case of *Grice* v. *Rix*, 3rd. Dev. 64, was cited. It has no application. The Court there decide, that where the liability of a party is not *direct* but collateral, and dependent upon the *default* of another, he must be notified of the *default*, before he can be charged. Here the liability of the defendant is direct and not collateral; and the only default was his own, in not paying the rent at the end of the year or furnishing the plaintiff with funds to do so: and this knowledge of the default was, to him, notice sufficient.

A number of depositions, notices and letters were made parts of this case. We must be permitted to suggest, that

this practice is inconvenient and expensive to the parties. So many of the depositions or notices, as may be necessary to present the point to the Court, are required, and no more ought to be incorporated into the case. In this case the Clerk has not only sent the originals, but also copies; for what purpose we cannot tell.

PER CURIAM. Judgment affirmed.